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IN THE

Supreme Court of the United States

October Term, 1956.

No. 886

LUCILLE H. BURCH,
Petitioner,

v.

READING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice, and the Associate Justices, of the Supreme Court of the United States:

Lucille H. Burch, by her attorneys, respectfully petitions that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on January 8, 1957.

OPINIONS BELOW.

The opinion of the Court of Appeals is to be found at 240 F. 2d 574 (C. A. 3, 1956). The opinion of the District Court, with which the majority of the Court of Appeals was "in full accord" is to be found at 140 F. Supp. 136 (D. C. E. D. Pa., 1956). This is the final judgment of the United States Court of Appeals for the Third Circuit, where judgment was entered for the respondent-defendant affirming the judgment of the United States District Court for the Eastern District of Pennsylvania, where judgment was entered for respondent-defendant on the verdict. Judge Kalodner dissented in the Court of Appeals.

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on January 8, 1957. The jurisdiction of this Court is invoked under c. 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. Sec. 1254 (1).

QUESTIONS PRESENTED.

I. In an action under the Federal Employers' Liability Act [1] is it not error for the Court of Appeals to affirm the action of a trial judge in taking from the jury's consideration competent evidence from which the jury could find respondent negligent in directing that petitioner do work beyond her capacity solely on the ground that such evidence presented conflicting inferences?

II. Is not the Court of Appeals in error in affirming the trial judge's charge, the substance of which was that an employer under the F. E. L. A. has no antecedent duty of inspecting premises where it knows or should know that one of its employees is required to perform her duties?

III. Is it not error for the Court of Appeals to affirm a jury instruction that as a matter of law if the petitioner's injury resulted from an accidental slip on a few pebbles, there would be no liability when those very pebbles presented evidence from which a jury could have found an unsafe place to work?

IV. Is it not error for the Court of Appeals to affirm the trial judge's submission to the jury of the question of whether the accident in suit occurred by reason of "sheer and unavoidable accident" where the submission of that issue was unrelated to a record containing admitted facts

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1. 35 Stat. 65, as amended, 36 Stat. 291, 53 Stat. 1404, 45 U. S. C. § 51 *et. seq.*

that indicated negligence and nothing to suggest an act of God?

V. Is not the Court of Appeals in error in affirming a jury charge regarding plaintiff's burden of proof as to negligence in an F. E. L. A. action which variously instructed the jury that the plaintiff's burden of proof was one of the "big points" in the case; that a verdict for defendant must be returned unless the jury had a "conviction" as to negligence; that it is plaintiff's burden "to convince [the jury] that there was . . . negligence" and that "If there is just a doubt in your mind, you must bring in a verdict for the defendant . . ."?

VI. Is not the Court of Appeals in error in affirming a jury instruction that the jury " . . . should no more be swayed by sympathy for the plaintiff than for the widows and orphans who may be receiving dividends or interest from [respondent railroad] and who may need that income for themselves and for their families"?

THE STATUTE INVOLVED.

The Federal Employers' Liability Act, 45 U. S. C. A., 35 Stat. 65, as amended, 36 Stat. 291, 53 Stat. 1404, § 51 *et seq.* the pertinent portion of which reads as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States . . . , shall be liable in damages to any person suffering injuries while he is employed by such carrier in such commerce, . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

STATEMENT OF THE CASE.

This is a suit brought under the above statute for injuries sustained by petitioner on November 27, 1950, while in the employ of respondent.

Petitioner had been employed by respondent in a track gang for six years prior to the date of the accident (44a, 46a). On the day in question, her foreman, Mr. DiLuzio, had sent her gang to repair Scott's Lane grade crossing in Philadephia (15a, 219a). Respondent's track bisects Scott's Lane. The road came up a hill with a fifteen degree grade immediately beyond the crossing to the south. This is a very steep grade (128a). The surface of Scott's Lane was badly worn and full of pebbles all the way from the crossing down to the bottom of the hill (25a, 136a, 137a). It was pitted with holes and many pebbles which had pulled loose because the asphalt surface or binding material which was supposed to hold the pebbles in place had worn away (25a, 78a, 124a, 127a, 136a, 137a). It was difficult to get a decent footing when walking on this hill and it was very slippery due to the loose pebbles (127a, 128a). This whole section of the road, including the point at which petitioner was injured, was to be completely repaved by the City of Philadelphia (133a, 134a).

On the day in question, petitioner had been directed by her foreman to carry dirt in a three-foot shovel from a pile lying east of the roadway and south of the crossing and she was to dump it into a hole in the crossing (15a, 16a, 27a). While walking diagonally down across Scott's Lane to the dirt pile to get another shovelful, she fell and suffered the injuries complained of. As she fell her feet rolled under her. She felt pebbles under her shoes (55a). The place in question was surrounded with pebbles and those pebbles caused her to fall (63a-67a). Her foreman admitted that he found the skid mark of her shoe right after the accident had happened and saw twenty or thirty pebbles around the immediate area (221a, 222a). The

day was cold and the streets were dry and free of ice and snow (15a, 226a). There was thus no condition other than the loose pebbles which could have contributed to the accident in suit.

R. W. Morrison, respondent's track supervisor, admitted that he had issued an order to the track foreman to keep female employees out of sight so that they would not be visible to respondent's Board of Directors who would be going past on trains (146a, 148a). Morrison admitted that he had directed that they keep the track cleaned up, in good shape and free of debris. Another of Morrison's orders was to the effect that women were to be made to work as hard as men and render the same services as men (161a-162a). This was respondent's policy. Other evidence established that any women who complained that the work was too hard were to be laid off (157a, 158a, 162a). All of Morrison's testimony and underlying exhibits were stricken by the trial court and the jury was instructed to disregard it (291a, 321a, 324a).

The aforementioned DiLuzio admitted that he had an order to make the women work as hard as the men but that he tried to circumvent the order because he knew that women were not able to do this kind of work, and that he tried to act "human" and gave them lighter jobs when he could (224a, 227a-228a). Notwithstanding this, on the day in question DiLuzio assigned petitioner the job of carrying soil in a shovel up and down the hill in question (228a, 229a).

As a result of the accident in suit, the petitioner suffered a severely fractured ankle, atrophy of the bone, arthritis of the joint with narrowing of the articular spaces where the various bones of the ankle are made up and a thickening of the outer surface. The site itself represents in its entirety a completely abnormal joint. The condition is permanent (86a, 87a). There was also considerable soft tissue damage, traumatic arthritis of the left ankle and a foot drop as a result of nerve damage (95a).

The case was submitted to the jury after a charge by the trial judge which was fraught with error as indicated in the "Argument" *infra*. Appropriate exceptions were taken by the petitioner to various portions of the charge and petitioner in addition moved for the withdrawal of a juror because of the error and unfairness of it (346a-353a, 356a-357a). The jury returned a verdict for the defendant.

Petitioner thereafter filed a motion for a new trial (371a-375a) which was subsequently denied by the trial court in an opinion reported at 140 F. Supp. 136 (376a-412a). Petitioner appealed from the judgment of the District Court and the judgment was affirmed by the United States Court of Appeals for the Third Circuit on January 8, 1957, by a divided court. Circuit Judge Maris was joined in the affirmance by District Judge Wortendyke. Circuit Judge Kalodner dissented. This petition for certiorari follows.

REASONS FOR GRANTING THE WRIT.

For the purpose of clarity, a statement of reasons for granting the writ is here set forth. These are expanded in the argument following this resumé.

1. This decision is in conflict with the decisions of this Court in *Quercia v. United States*, 289 U. S. 466, 53 S. Ct. 698 (1933); *Blair v. B. & O. R. R. Co.*, 323 U. S. 600, 65 S. Ct. 545 (1945); *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1946); *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409 (1944); *Myers v. Reading Company*, 331 U. S. 477, 67 S. Ct. 1334 (1947); *Lillie v. Thompson*, 332 U. S. 459, 68 S. Ct. 140 (1947); *Wilkerson v. McCarthy et al.*, 336 U. S. 53, 69 S. Ct. 413 (1949); *Stone v. N. Y. C. & St. L. RR.* 344 U. S. 407, 73 St. Ct. 358 (1953); *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 500, 77 S. Ct. 443 (1957); *Webb v. Illinois Central Railroad Co.*, 352 U. S. —, 77 S. Ct. 451 (1957); *Shaw v. Atlantic Coast Line R. R. Co.*, No. 743 and *Futrelle v. Atlantic Coast Line R. R. Co.*, No. 782, both decided April 1, 1957.

2. One of the questions presented by this case is now before this Court in *Texas & Pacific Railway Company v. Thompson,* 232 F. 2d 313 (C. A. 5, 1956), cert. granted on October 22, 1956, No. 321, and *Deen v. Gulf, Colorado and Santa Fe Railway Company,* 275 S. W. 2d 529, cert. granted October 8, 1956, No. 199 both set for argument the week of April 1, 1957.

3. This decision is in conflict with the decisions of the United States Court of Appeals for the Second Circuit in *Stewart v. B. & O. R. R. Company,* 137 F. 2d 527 (C. A. 2, 1943); *Comiskey v. P. R. R.,* 228 F. 2d 687 (C. A. 2, 1956); *Cereste v. New York, New Haven & Hartford R., Co.,* 231 F. 2d 50 (C. A. 2, 1956), cert. denied 351 U. S. 95, 76 S. Ct. 848 (1956); *Larson v. Jo Ann Cab Corp.,* 209 F. 2d 929 (C. A. 2, 1954); *Johnson v. Erie Railroad Co.,* 236 F. 2d 352 (C. A. 2, 1956).

4. This decision is in conflict with the decisions of the same Court of Appeals in *Nuttall v. Reading Company,* 235 F. 2d 546 (C. A. 3, 1956); *Robak v. P. R. R.,* 178 F. 2d 485 (C. A. 3, 1949); *Robinson v. Pennsylvania R. Co.,* 214 F. 2d 798 (C. A. 3, 1954).

5. This decision is in conflict with the decisions of the United States Court of Appeals for the Fourth Circuit in *Chesapeake & Ohio Ry. Company v. Thomas,* 198 F. 2d 783 (C. A. 4, 1952) cert. denied 344 U. S. 921, 73 S. Ct. 387 (1953); *Virginian Rwy. Co. v. Armentrout,* 166 F. 2d 400 (C. A. 4, 1948).

6. This decision is in conflict with the decisions of the United States Court of Appeals for the Fifth Circuit in *Williams v. Atlantic Coast Line R. Co.,* 190 F. 2d 744 (C. A. 5, 1951); *Johnson et al. v. Macias,* 193 F. 2d 475 (C. A. 5, 1952).

7. This decision is in conflict with the decisions of the United States Court of Appeals for the Sixth Circuit in *Carpenter v. B. & O. R. Co.,* 109 F. 2d 375 (C. A. 6, 1940);

Knapp v. Kinsey, 232 F. 2d 458 (C. A. 6, 1956), cert. denied 352 U. S. 892, 77 S. Ct. 131 (1956).

8. This decision is in conflict with the decisions of the United States Court of Appeals for the Seventh Circuit in *Waddell v. Chicago & E. I. R. Co.*, 142 F. 2d 309 (C. A. 7, 1944) cert. denied 323 U. S. 732, 65 S. Ct. 69 (1944); *Beattie v. Elgin, Joliet & Eastern Railway Co.*, 217 F. 2d 863 (C. A. 7, 1954).

9. This decision is in conflict with the decisions of the United States Court of Appeals for the Eighth Circuit in *Terminal R. Ass'n. of St. Louis v. Fitzjohn*, 165 F. 2d 473 (C. A. 8, 1948); *Chicago G. W. R. Co. v. Smith*, 228 F. 2d 180 (C. A. 8, 1955); *Chicago G. W. R. Co. v. Casura*, 234 F. 2d 441 (C. A. 8, 1956); *Sperber v. Connecticut Mut. Life Ins. Co.*, 140 F. 2d 2 (C. A. 8, 1944), cert. denied 321 U. S. 798, 64 S. Ct. 939 (1944); *Cook v. United States*, 18 F. 2d 50 (C. A. 8, 1927); *Boatright v. United States*, 105 F. 2d 737 (C. A. 8, 1939); *Stoneking v. United States*, 232 F. 2d 385 (C. A. 8, 1956), cert. denied 352 U. S. 835, 77 S. Ct. 54 (1956).

10. This decision is in conflict with the decisions of the State Courts of last resort in *Brock v. Gulf Mobile & Ohio Railroad Company*, 270 S. W. 2d 827 (Mo., 1954); *Nelson v. Lee*, 32 So. 2d 22 (Ala., 1947); *Hill Grocery Co. v. Wilson*, 89 So. 2d 687 (Ala., 1956); *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 73 A. 2d 387 (1950); *Narcisco v. Mauch Chunk Township*, 369 Pa. 549, 87 A. 2d 233 (1952); *Knight v. Allegheny County*, 377 Pa. 502, 105 A. 2d, 141 (1954).

11. This decision, unless corrected, will inevitably and rapidly generate a flood of additional litigation and appeals on aspects of the Federal Employers' Liability Act which are common to most such cases and equally common to a vast number of cases in general civil litigation.

Point I.

In an F. E. L. A. Action Evidence Susceptible of the Inference That an Employee Had Negligently Been Directed or Permitted to Do Work Beyond Her Capacity Must Be Submitted to the Jury as Well as the Theory Underlying It, and the Fact That Such Testimony May Present Conflicting Inferences Also Commands Submission to the Jury.

This Petition unavoidably raises a number of critical issues of law, the resolution of which will have extremely widespread ramifications into the administration of the Federal Employers' Liability Act, 35 Stat. 65, as amended, 36 Stat. 291, 53 Stat. 1404, 45 U. S. C. § 51 *et seq.* and vital areas of general civil litigation.

In the case at bar, the majority of the Court of Appeals below did not deal with all of them in its opinion but that Court did however find itself "in full accord"[2] with the holding of the trial judge (at page 2a). It is therefore clear that the source of the errors which must be corrected by a grant of this Petition and a reversal of the judgment below can fairly be said to be in the Court of Appeals for the Third Circuit.

This was a simple F. E. L. A. case. As a result of the errors below which are the product of extraordinary indifference to the integrity and force of prevailing rules of law, it has become a grotesque cause.

Petitioner's case was tried on the double theory that: (1) respondent had negligently failed to furnish her with a safe place to work and/or (2) had negligently directed or permitted her to do work beyond her capacity. Nothing more than that was involved. We shall shortly discuss the manner in which the trial court erroneously emasculated the "safe place to work" issue. As to the other issue, that

2. All subsequent references to the opinion of the Court of Appeals are to the opinion as paginated in the "Appendix", *infra*.

court simply tore it bodily out of the case. The rationale on which it did so finds no justification in the record and, most remarkably, the very language with which it seeks to justify that excision propounds a rule of law which is in absolute conflict with a large and until now uniform body of rulings on the point. In holding itself in "full accord" with the trial judge the Third Circuit has isolated and set itself at war with this Court, and other Courts of Appeals. The courts below stand alone in the views they have taken of the issues here.

At the trial petitioner proved in support of this second theory of liability that each woman was instructed that she must do the same hard work as men; that complaints had been made by female employees that the work was too hard; that respondent was on notice that this work was too hard for women and had taken the position that since there were such complaints, the female employees would be held responsible (155a, 156a, 157a, 158a, 161a, 162a, 417a-419a). In Exhibit 10 (419a), specifically addressed to petitioner, respondent stated that another female laborer had made a complaint about the work being too arduous and that since petitioner had not taken exception thereto, she was considered by the respondent as likewise making the same complaint.

There was thus before the jury evidence in the nature of an admission by respondent that this work was beyond petitioner's capacity. The author of the exhibit, Morrison, was respondent's track supervisor under whom petitioner worked. On his direct examination he testified (158a):

> "Q. Now, having had these notices brought to your attention, was there or was there not and had there or had there not been substantial discussion between the railroad company, through you, and these women laborers in regard to the duties that were being imposed upon them as laborers?
>
> A. Not upon the duties being imposed upon them. Upon the amount of work they were turning out.

Q. And whether they could do that kind of work?

A. There was a discussion about that.

Q. Whether they could do that kind of work; is that right?

A. Yes, sir."

On cross-examination he testified (161a):

" 'Q. Were they expected to do the same kind of work when they were hired that men laborers were expected to do?'

A. That is my understanding, that they were.

By Mr. Brown:

Q. During the years from 1944 to 1950 was there ever any instruction given by the management of the company that women track laborers were not to do the same kind of work as male track laborers?

A. No, sir.

Q. Did they continue during that time from 1944 to 1950 to do the same work as male laborers, with the approval of the management?

A. Yes, sir, the management approved the arrangement."

* * *

"Q. What, if you know, was the policy of the management as it came down to you with respect to whether track laborers should be doing heavy work as opposed to picking up papers?

"A. It is the policy of the management to get as much heavy work done as we can, but they recognize, in fact, that there is a certain amount of light duties that must be taken care of also, but primarily it is to do the heavy work."

The court struck out all of Morrison's testimony and underlying exhibits and so charged the jury (321a, 324a).

In its opinion the trial court denied that it ruled as a matter of law that petitioner could not recover on this

theory, and rested its denial on the assertion that "The court did not use any such language in the charge . . ." (383a). The court also claimed that we had neither requested to charge on the theory nor specifically pointed out to the court its failure so to charge (383a-384a).

This was not so. We raised it as early as the pretrial conference (7a). It was suggested to the court during trial (242a) and the court recognized our position (243a). After striking it from the case, the court granted us an exception (291a). The record is therefore protected.

This is the heart of the trial court's rationalization of its ruling (386a-387a):

> "Since plaintiff was unsuccessful in showing any admission by the company, or by Mr. Morrison personally, or any other evidence that plaintiff was doing any work in excess of her physical ability or that plaintiff had ever made a claim that she had been asked to do work which was too difficult for her, and *since consideration of this testimony and these memoranda had emphasized conflicting inferences that might be drawn from the language of four exhibits* (*P-9, P-10, P-12 and P-13*), [footnote] *offered by plaintiff*, the court granted defendant's motion to strike the testimony of Mr. Morrison just before the closing speeches [footnote] and advised the jury to disregard the testimony of Mr. Morrison at the beginning of the charge [footnote]. . . ." (Emphasis supplied.)

On this unambiguous statement the court took from petitioner her right to trial by jury on the issue and in doing so flatly refused to adhere to clear law on the subject. That is error enough. Even more remarkable is that the Court of Appeals, having such error brought directly to its attention, refused to treat it at all in its opinion except to find itself "in full accord" with the trial judge.

The effect of the decisions below is to withhold from the jury's consideration a theory of liability under the

F. E. L. A. well bottomed in evidence and authenticated by clear, authoritative decisional law.

This Court directly acknowledged the validity of the theory in *Stone v. N. Y. C. and St. L. R. R.*, 344 U. S. 407, 73 S. Ct. 358 (1953); *Blair v. B. & O. R. R. Co.*, 323 U. S. 600, 65 S. Ct. 545 (1945), and can fairly be said to have done so in *Lillie v. Thompson*, 332 U. S. 459, 68 S. Ct. 140 (1947). The question is squarely before this Court now in *Texas and Pacific Railway Company v. Thomson*, 232 F. 2d 313 (C. A. 5, 1956), cert. granted October 22, 1956, No. 321, and *Deen v. Gulf, Colorado and Santa Fe Railway Company*, 275 S. W. 2d 529, cert. granted October 8, 1956, No. 199, both set for argument in the week beginning April 1, 1957.

The decisions below are also in conflict with the law in the Second Circuit: *Stewart v. B. & O. R. R. Co.*, 137 F. 2d 527 (C. A. 2, 1943); *Comiskey v. P. R. R.*, 228 F. 2d 687 (C. A. 2, 1956); with the law previously announced by the Court of Appeals below: *Nuttall v. Reading Company*, 235 F. 2d 546 (C. A. 3, 1956); *Robak v. P. R. R.*, 178 F. 2d 485 (C. A. 3, 1949); and with the law in the Fifth Circuit: *Williams v. Atlantic Coast Line R. Co.*, 190 F. 2d 744 (C. A. 5, 1951).

See also *McGuigan v. Southern Pacific Company*, 247 P. 2d 415 (D. C. of App. 1st Dist., Cal., 1952).

The error of the courts below in refusing to acknowledge the operation of this theory of liability in the case was of a piece with their excision of the evidence in question. Under F. E. L. A. decisional law there was an evidentiary basis in this record for a jury's finding of negligence on the theory claimed. *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1946). The two theories of liability in question were closely interwoven, and it was clear that respondent's negligence could have been considered on one theory or the other, or both. In those circumstances the employer's negligence may be determined by viewing its conduct as a whole. *Blair v. B. & O. R. R. Co., supra.* These cases,

we respectfully submit, completely substantiate our view, but if there were any lingering doubts they have been dispelled by the recent holdings in this Court in *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 500, 77 S. Ct. 443 (1957); *Webb v. Illinois Central Railroad Co.*, 352 U. S. —, 77 S. Ct. 451 (1957); *Shaw v. Atlantic Coast Line R. R. Co.*, No. 743 and *Futrelle v. Atlantic Coast Line R. R. Co.*, No. 782, both decided April 1, 1957.

As we had earlier indicated, the very language of the trial court used to justify the excision is in total conflict with the great body of law on the point. Whereas it found, and the Court of Appeals was in full accord with the finding, that "conflicting inferences" arose from the testimony and memoranda in question and therefore struck the testimony from the case, that is exactly what should not have been done. In this posture, the matter had to be for the jury. *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409 (1944); *Myers v. Reading Company*, 331 U. S. 477, 67 S. Ct. 1334 (1947).

Point II.

Under the F. E. L. A. the Employer's Absolute Duty to Use Reasonable Care to Furnish a Reasonably Safe Place to Work Includes the Duty of Antecedent Inspection of That Place.

The Trial Court charged (330a):

> "Even if you believe plaintiff's position that there were so many pebbles that an unsafe condition existed, you must consider, among other things, whether the defendant's foreman, Mr. DiLuzio, who was the defendant's chief representative on the scene, should have had notice of this condition, in view of the fact that only an hour, approximately, elapsed between the time work started at this location and the time of the accident and the fact that plaintiff herself admitted that

all the other workmen, except the man loosening the dirt in the pile of dirt for her, were on the other side of the railroad track.

"You must decide whether this condition existed long enough so that the defendant, under all the circumstances, could be said to have failed to have used reasonable care in not removing the pebbles by sweeping or otherwise."

The effect of this instruction was to leave the jury with the understanding that respondent could lawfully order or permit its crew to begin working immediately upon arrival at the place in question regardless of its condition, and that the employer would *thereafter* have a reasonable time to inspect it to determine whether it was reasonably safe. If this were the law, the doctrine of safe place to work would be words stripped of substance. It is not the law.

In *Webb v. Illinois Central R. Co.*, 352 U. S. —, 77 S. Ct. 451 (1957) decided in this Court on February 25, 1957, petitioner slipped and fell over a clinker which was imbedded in the roadbed of the railroad. The holding there necessarily assumes that liability flowed from respondent railroad's breach of its duty to make an antecedent inspection of the place where its employee was injured. The Court there said:

"As the jury might find that the clinker was in the ballast used in the repair work, so also the jury might find, from the fact that it was in the roadbed for three weeks, that inspection was not properly made. There was evidence from which it could have been found that the clinker was not discovered either by the foreman in semiweekly inspections of the location, made in part to discover and remove hazards to workmen, or by a track inspector and a track supervisor making less frequent inspections. It was for the jury to weigh

the evidence and to decide whether or not the inspections satisfied respondent's duty to provide the petitioner with a safe place to work."

The "inspection" referred to necessarily means an inspection antecedent to the employee's working in the place in question.

The charge on the point in question (330a), of course, means that railroads may furnish—that is provide at the outset—unsafe places to work to their employees, and they thereafter have some unspecified period of time within which they may make an inspection to determine and correct the unsafe condition. This would simply make a mockery of the safe place to work doctrine.

Since the employer's duty is to *furnish* a safe place to work, directing or permitting an employee to enter an unsafe place to work such as here is palpably the breach of that duty. It is negligence. What in effect has been done by the courts below is to destroy the absolute quality of the duty and instead make of it a spurious duty coming into play at some indefinite time after the employee has arrived at the scene. There is thus created a hiatus in which injury may result from the employer's negligence—failing to furnish a safe place to work—and yet the employer will be insulated from liability on the claim that it did not have a reasonable time after furnishing the unsafe place to discover its condition.

Not to correct the error below would generate a rash of additional litigation in all such cases, for defendants would always claim that even though admittedly they furnished an unsafe place to work, they did not have a reasonable time after the employee had been placed in those circumstances in which to discover the unsafe quality of the area. It is an impossible contention because it posits a breach of a duty which is by definition negligence and yet claims that breach is not necessarily negligence—a bold contradiction in terms. This is the embarrassing logic of the

error below. If the doctrine is to have any meaning at all, it must subsume the duty of the employer to make an antecedent inspection.

What is urgently needed now and what only this Court can give with the full force of its authority is a clear restatement laying down the duty of antecedent inspection. Only thus will such potential litigation be smothered.

Cases in other Courts of Appeals demonstrate the law to be other than that suggested by the erroneous rulings below. These erroneous decisions below are thus in conflict with the law in the Second Circuit: *Cereste v. New York, New Haven & Hartford R. Co.*, 231 F. 2d 50 (C. A. 2, 1956), cert. denied 351 U. S. 95, 76 S. Ct. 848 (1956); with the law in the Fourth Circuit: *Chesapeake & Ohio Ry. Co. v. Thomas*, 198 F. 2d 783 (C. A. 4, 1952), cert. denied 344 U. S. 921, 73 S. Ct. 387 (1953); *Williams v. Atlantic Coast Line R. Co.*, 190 F. 2d 744 (C. A. 5, 1951); with the law in the Seventh Circuit: *Waddell v. Chicago & E. I. R. Co.*, 142 F. 2d 309 (C. A. 7, 1944), cert. denied 323 U. S. 732, 65 S. Ct. 69 (1944); *Beattie v. Elgin, Joliet and Eastern Railway Co.*, 217 F. 2d 863 (C. A. 7, 1954); with the law in the Eighth Circuit: *Terminal R. Ass'n of St. Louis v. Fitzjohn*, 165 F. 2d 473 (C. A. 8, 1948); *Chicago G. W. R. Co. v. Smith*, 228 F. 2d 180 (C. A. 8, 1955); *Chicago G. W. R. Co. v. Casura*, 234 F. 2d 441 (C. A. 8, 1956).

See also: *Brock v. Gulf, Mobile & Ohio Railroad Company*, 270 S. W. 2d 827 (Mo., 1954).

Point III.

Where There Is Evidence From Which a Jury Can Infer the Cause of the Accident in Suit, Instructions Permitting a Finding That Injuries Resulted From a Mere Accident Are Erroneous.

The trial court charged:

". . . If you find that the injury resulted from an accidental slip on one of a few pebbles, neither the de-

fendant nor the plaintiff could be said to be negligent, and you must find a verdict for the defendant, of course. The railroad isn't responsible for accidents. They might happen anywhere." (330a)

To charge thus in the face of this record where the reasonable inference can be drawn that petitioner slipped as a result of the presence of pebbles on the road surface is sheer error. Such an instruction would permit the jury to make a finding that had no basis in law or in fact.

A large number of cases have laid down this general principle of law with which the decisions below are now in conflict.

In *Wetterer v. The Atchison, Topeka & Santa Fe Ry. Co.*, 277 Ill. App. 275 (1934), cert. den. 295 U. S. 754, 55 S. Ct. 835 (1935), the defendant asked the Court to charge as follows at 298:

> "The Court instructs you that the fact that if you believe from the evidence the injury complained of by the plaintiff was the result of a mere accident, you must find the defendant not guilty."

The court held that it would have been error so to charge. One may not charge in the abstract. The facts of a case must be tied in with the allegations and proof. The jury must give due consideration to the facts in the case and decide whether under all the evidence there was or was not negligence. As the *Wetterer* case points out, this instruction on mere accident is subject to the criticism that it omits the question of negligence which may have caused the accident. The question of negligence must be incorporated in the specific point. This the court below did not do in this case as it did not in *Wetterer*.

In *Johnson et al. v. Macias*, 193 F. 2d 475 (C. A. 5, 1952), the plaintiff while on defendant's premises was injured when struck by flying fragments of a metal pulley which disintegrated while revolving at a high speed. The

court affirmed a verdict for the plaintiff and held that the trial judge properly refused to charge on the subject of "unavoidable accident". Said the Court at 479:

> "The trial court did not err in refusing to give a charge on 'unavoidable accident'. An 'unavoidable' accident is one which is not occasioned in any degree, directly or remotely, by lack of due care. If the injury complained of could have been prevented by the exercise of reasonable prudence, it would not be the result of 'unavoidable' accident. *There is no evidence here tending to show that plaintiff's injuries resulted from any cause other than negligence on the part of some one.* The issue of unavoidable accident is therefore not presented. Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S. W. 2d 944, 97 A. L. R. 1513; Dallas Terminal Co. v. Darden, Tex. Com. App., 38 S. W. 2d 777. Finding no prejudicial error, the judgment is Affirmed." (Emphasis ours.)

In *Maher v. St. Louis & S. F. Ry Co.*, 234 S. W. 1034 (St. Louis Ct. of App., Mo., 1921), the court held that the trial judge properly refused to instruct the jury ". . . that if the injury received was caused by accident, mischance or misadventure, and without the negligence of either plaintiff or defendant, plaintiff was not entitled to recover" (at 1037). The point as submitted failed to tie into the factual issues in the case. See also *Kansas City, M. & O. Ry. Co. v. Estes*, 228 S. W. 1087 (Tex. 1921) and *Pennsylvania R. Co. v. Ribkee*, 174 N. E. 427 (Indiana, 1930).

Indeed, we might note that respondent had not pleaded in this case that this was a "mere accident" or an "unavoidable accident". Hence this was not an issue in this case. The court should not have charged upon subjects which were not properly made issues in the case.

In *Carpenter v. B. & O. R. Co.*, 109 F. 2d 375 (C. A. 6, 1940), the court so held. At page 379 said:

> "Applying the well-recognized rule that in determining the scope of instructions, the court must keep in mind the issues as made by the pleadings in the cause and that no instructions be given which tender an issue not supported by the pleadings, the court committed an error in submitting to the jury the issue of contributory negligence and assumed risk and in charging the jury that the fellow servant rule applied."

The other prejudicial effect which resulted from a charge such as this was accurately noted by Judge Kalodner in his dissent below. It is that such a charge is an inferential ruling that there was no absolute duty on the part of the defendant to provide the plaintiff with a reasonably safe place to work, thus operating in effect to take from the jury's consideration the entire "safe place to work" issue (at page 16a). Thus, not only was that issue emasculated by the court's failure to charge the duty of antecedent inspection, but what little life that might have been left in it was destroyed by this inferential ruling.

In so doing, the courts below give recrudescence to the rule of *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, 34 S. Ct. 635 (1914) declared no longer to be the law in *Wilkerson v. McCarthy*, 336 U. S. 53, 69 S. Ct. 413 (1949).

Point IV.

A Jury Charge in an F. E. L. A. Case Which Places Upon the Plaintiff the Burden of "Convincing" the Jury of Negligence and Exonerates Defendant of Liability in the Absence of That "Conviction" or "If There Is Just a Doubt" in the Jury's Mind Imposes Upon Plaintiff a Prejudicial and Patently Erroneous Burden of Proof.

The concept of different burdens of proof in civil and criminal cases is part of the bedrock of Anglo-Saxon law. The criminal accused is shielded by a number of fundamental safeguards one of which is that a finding of guilt can be made only after the prosecution has carried the

great burden of proving guilt "beyond a reasonable doubt." This is the heaviest burden of proof known to our law. With that onerous burden this petitioner was shackled in an F. E. L. A. action.

In most civil cases, and certainly in F. E. L. A. actions, the plaintiff bears no such burden. He need only prove his case by a mere preponderance of the evidence. It is primer law that there is a great difference between the burdens of "preponderance of the evidence" and "beyond a reasonable doubt." In order to meet the test of preponderance of the evidence all that is necessary is that the evidence in the plaintiff's case merely outweigh that in the defendant's case, so that it tips the scale in the plaintiff's favor or stated simply: the plaintiff need only show that he has a better case than defendant. To require in an F. E. L. A. case that the jury be "convinced" by argument to belief beyond doubt is to place upon a plaintiff at least as heavy a burden as that imposed on the prosecution in a criminal case, and, of course, it profoundly diminishes railroad defendants' exposure to verdicts against them. The whole remedial purpose of the F. E. L. A. is thus subverted. This is precisely what occurred in the case at bar.

The trial court in this case charged the jury as follows at Page 329(a):

> ". . . If, after considering all the evidence, the question of whether or not the defendant or its employees, other than the plaintiff, of course, were negligent in failing to use reasonable care to provide plaintiff with a safe place to work is so evenly balanced in your mind *that you have no conviction,* then you must find for the defendant. It is her burden to *convince* you that there was this negligence. . . ." (Emphasis supplied.)

Further at Page 333(a) the Court went on to say in emphatic reiteration of this manifestly erroneous statement of law as to burden of proof:

> "*Now, this is one of the big points for you,* this question of whether the plaintiff has proved to you by a preponderance of the evidence that there was a failure to use reasonable care under all these circumstances. There she was with her galoshes, her overalls, her work jacket. The evidence must do more than raise a doubt in your mind on these points, if plaintiff is to sustain the burden. *If there is just a doubt in your mind, you must bring in a verdict for the defendant, and that ends your consideration of the case. You don't need to go any further. . . .*" (Emphasis supplied.)

The net effect of these instructions was to impose upon plaintiff the burden of 'convincing" the jury which Webster's New Collegiate Dictionary defines to mean "to bring by argument to belief beyond doubt." Such has never been the burden of proof in a civil jury case, least of all in F. E. L. A. cases. The majority of the Court of Appeals, straining to avoid the sheer error of the charge, affirmed the trial court's language, saying at page 8a:

> "In any event there must surely be a *conviction* in the minds of the jurors before they may bring in a verdict for the plaintiff. They must be *convinced* or satisfied [footnote] in their minds that the plaintiff is entitled to their verdict." (Emphasis supplied.)

As Judge Kalodner so capably demonstrates in his dissent, certainly this is not the law. It is indeed noteworthy that the majority below made no effort to deal with the cases cited and discussed by Judge Kalodner. This refusal is the source of the error and conflict now existing as between the Third Circuit on the one hand and all state courts of last resort and Courts of Appeals which have ruled on the problem.

In *Larson v. Jo Ann Cab Corp.*, 209 F. 2d 929 (C. A. 2, 1954), Judge Frank acknowledged the state of authorities at Page 930:

"Courts and commentators have said that, in the ordinary civil suit, usually a judge commits reversible error if he instructs the jury that the plaintiff cannot recover unless 'he convinces' them (or the like). [Footnote to authorities] Such a charge, it is maintained indicates something midway between a 'preponderance' and 'beyond a reasonable doubt,' and should therefore be reserved for certain exceptional sorts of civil cases where more than a 'preponderance' is required. . . ."

He recognized the objections to the court's failure to abide by the rule applicable when he stated at Page 935:

"Nevertheless, at least until such time as we have satisfactory returns from checks of popular reactions to the traditional formulas, we think we should adhere to the ruling that, in an ordinary civil suit, such as the instant case, words like 'convince' and 'conviction' should be shunned in a jury charge. . . ."

Any attempt to distinguish *Larson* on grounds that the above quoted language was dicta must fail in the light of *Johnson v. Erie Railroad Co.*, 236 F. 2d 352 (C. A. 2, 1956) where the law in the Second Circuit is laid down very clearly and in the same tenor as *Larson*. *Johnson* should have been dispositive here. There the trial court had charged that it was up to the plaintiff to prove the medical side of his F. E. L. A. case with "reasonable certainty." The unanimous Court found that this instruction was erroneous in holding at Page 354:

". . . At least as to injuries actually suffered prior to the trial, it was incumbent on the plaintiff to prove a causal connection with the defendant's negligence only by a fair preponderance of the evidence: to require proof to a 'reasonable certainty' imposed an excessive burden."

In the case at bar the trial judge not only required proof at the level of "a reasonable certainty" by using the

language as to "just a doubt in your mind," but went even further when he spoke in terms of "conviction." This did nothing less than lay upon plaintiff the burden of the prosecution in a criminal action.

The language in the case at bar as to "doubt" is strikingly similar to language charged in the *Johnson* case, *supra* and quoted at Page 355:

> ". . . *if you have any doubt about it then* he [the plaintiff] has not sustained the burden of proof which the law imposes upon him."

Of that instruction Judge Hincks said at Page 355:

> "That statement was erroneous. Notwithstanding a doubt thus engendered a jury might yet properly find that the plaintiff had sustained the burden under which he labored."

State courts as well as Federal Courts recognize the error of the language used in the case at bar. See *Nelson v. Lee*, 32 So. 2d 22 (Ala., 1947); *Hill Grocery Co. v. Wilson*, 89 So. 2d 687 (1956); *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 73 A. 2d 387 (1950); *Botta v. Brunner*, 42 N. J. Super. 95 (1956).

Point V.

A Jury Charge in an F. E. L. A. Case Which Instructs That ". . . [the Jury] Should No More Be Swayed by Sympathy for the Plaintiff Than for the Widows and Orphans Who May Be Receiving Dividends or Interest From [Defendant Railroad] and Who May Need That Income for Themselves and for Their Families"[3] Is Highly Prejudicial and in and of Itself Commands the Grant of a New Trial if a Verdict for Defendant Is Returned.

As we have shown, *supra*, this charge was an extraordinary concentration of error. Perhaps the single most

3. 325(a).

shocking and prejudicial aspect of it was the instruction quoted in the heading of this Point, *supra*.

At the very outset of the charge the trial judge erroneously struck out one whole theory of liability.[4] Having thus improperly sapped petitioner's cause of action of much of its strength, he immediately thereafter fatally infected what little was left of her case with the above-quoted instruction.

In attempting to justify the instruction, the majority below stated at page 3a:

> ". . . [the trial judge] was not, as the plaintiff argues, bringing into the case for the jury's consideration additional parties who had no place there, as was done in the cases which the plaintiff cites. On the contrary he was obviously seeking to eliminate all such extraneous parties on both sides from the jury's consideration and in this graphic way to make it clear to them that no sympathy of any sort for either side should play any part in their decision."

Fairly paraphrased, this statement suggests that the way a trial judge should teach objectivity is to bring extraneous material into a case and then tell the jury to disregard it. It is a curious epistemology which expects a jury to learn objectivity by being asked to ignore the emotionally charged contrast of needy widows and orphans—untold numbers of them—pitted against one litigating claimant.

These were widows and orphans of whose existence, we hasten to add, there was not a shred of proof in the entire record of the case, and of whose dependency on the dividends and interest from respondent there was an equally total failure of proof.

In the terms of the trial judge and the majority below, this is "neutraliz[ing]"—a concept on these facts approximately as valid as unscrambling an egg.

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4. See "Point I", *supra*.

Even assuming, *pro arguendo*, that the comments of petitioner's counsel were not proper, this utterance by the trial judge can no more be justified in law than in instructional psychology. If the trial judge thought it was incorrect, he should have charged the jury to ignore that reference and thus take it from their consideration, a recognized procedure he had no hesitation in using when he charged *competent evidence* out of the case.[5] So too he could have ordered a mistrial or set aside a verdict for petitioner.

The majority below, so quick to invoke the trial judge's right of "neutralizing" alleged prejudice with rampant prejudice, has failed to heed the obligations of the rule laid down within the recent past by its very own court: that counsel may not reply in kind to improper remarks made by opposing counsel. *Robinson v. Pennsylvania R. Co.*, 214 F. 2d 798 (C. A. 3, 1954).

If recrimination by counsel be barred, how much more unseemly is it that the court indulge the equivalent of recrimination and then euphemize it as "neutralizing." We protest not the motive but the effect of such behavior, and that effect is more prejudicially telling when accomplished by a court than it would be if attempted by zealous counsel in the heat of trial because it is invested with the dignity and authority of the court.

The instruction complained of was prejudicially argumentative and erroneous, inexcusable on the theory sought to justify it below, and a radical departure from traditional concepts of fair trial. *Quercia v. U. S.*, 289 U. S. 466, 53 S. Ct. 698 (1933); *Sperber v. Connecticut Mut. Life Ins. Co.*, 140 F. 2d 2 (C. A. 8, 1944), cert. denied 321 U. S. 798, 64 S. Ct. 939 (1944); *Knapp v. Kinsey*, 232 F. 2d 458 (C. A. 6, 1956), cert. denied 352 U. S. 892, 77 S. Ct. 131 (1956); *Cook v. U. S.*, 18 F. 2d 50 (C. A. 8, 1927); *Boatright v. U. S.*, 105 F. 2d 737 (C. A. 8, 1939); *Stoneking v. U. S.*, 232 F. 2d 385 (C. A. 8, 1956), cert. denied 352 U. S. 835, 77 S. Ct. 54

5. See "Point I", *supra*.

(1956); *Virginian Railway Co. v. Armentrout*, 166 F. 2d 400 (C. A. 4, 1948). Identical conduct has been declared prejudicial reversible error in Pennsylvania, where this trial court sat. *Narcisco v. Mauch Chunk Twp.*, 369 Pa. 549, 87 A. 2d 233 (1952); *Knight v. Allegheny County*, 377 Pa. 502, 105 A. 2d 141 (1954).

If this error is countenanced, and not corrected by grant of certiorari and reversal of the judgment below, the mischief to which it will lead will be immediate. It is a bold invitation to every corporate defendant in personal injury actions—F. E. L. A., Jones Act, common-law negligence—to invoke the pitiful, irrelevant (and unproven) image of needy widows and orphans dependent upon defendants for dividends and interest whenever sympathy—real or otherwise—comes into a plaintiff's case. The argument such defendants will urge is as foreseeable as the mischief: "If courts can 'neutralize' this way, surely we can too."

CONCLUSION.

The judgment in the case at bar was the result of serious and prejudicially erroneous errors of law justification for which was attempted in the decisions supporting the judgment below. Those decisions are in direct conflict with a mass of consistent, authoritative law in this court, federal Courts of Appeal and state courts of last resort on a number of vital aspects of the Federal Employers Liability Act and civil trial by jury generally.

Unless corrected here by a grant of certiorari, reversal and new trial, the errors below will deprive petitioner of rights granted her by solemn Act of Congress, ramify into emasculating administration of the F. E. L. A. in courts throughout the entire nation and thus deprive countless other employees of interstate carriers by rail of the benefits of this remedial legislation. The errors below also pose

the immediate threat of serious disruption of long standing fundamental rules governing civil trial by jury generally.

This petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,908

LUCILLE H. BURCH,
Appellant

v.

READING COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued November 5, 1956

Before MARIS and KALODNER, *Circuit Judges*, and WORTENDYKE, *District Judge*.

Opinion of the Court.

(Filed January 8, 1957)

By MARIS, *Circuit Judge*.

This is an appeal by the plaintiff from a judgment entered on a verdict in favor of the defendant in an action brought under the Federal Employers' Liability Act to recover for injuries suffered by the plaintiff while working as a track laborer for the defendant railroad. The plaintiff asserts that the trial judge erred in certain trial rulings and instructions to the jury. All the matters complained of were fully considered by the district court in an elaborate opinion by Judge Van Dusen denying the plaintiff's motion

for a new trial. 140 F. Supp. 136. Finding ourselves in full accord with what is there said we conclude that the judgment should be affirmed. To what Judge Van Dusen has said we need add merely a few comments with respect to three of the objections raised to the trial judge's charge.

The plaintiff was injured on November 27, 1950 while working as a member of a railroad section gang at Scott's Lane crossing in the East Falls section of Philadelphia. That morning her task was to carry dirt in a shovel from a pile by the side of Scott's Lane below the crossing to fill in holes under the rails of the tracks in the crossing. She had been engaged in this work for about an hour when on crossing Scott's Lane with an empty shovel returning from the tracks toward the pile of dirt she fell and broke her ankle. It was for this injury that she sought to recover damages in the suit before us.

At the time of the trial the plaintiff was a widow 55 years of age. She testified that she had raised two children, not her own, both of whom were then grown and no longer living with her. In his closing argument to the jury, counsel for the plaintiff laid much stress on this fact, appealing for a verdict which would enable her to be "a mother to little children that needed it" and to make it possible for her to leave something "to those who are near and dear to her".[1] To neutralize any possible prejudice resulting from this appeal on behalf of nonexistent "little children" the trial judge felt it was his duty, as he states in his opinion,[2] to charge the jury as follows:

> "If you are sympathetic or prejudiced in favor of or against either the plaintiff or the defendant, you should not allow such sympathy or prejudice to influence you at all in your verdict. You should no more be swayed by sympathy for the plaintiff than for the widows and orphans who may be receiving dividends

1. The exact language used by counsel is quoted in the opinion of the district court, 140 F. Supp. 136, 150-151.
2. 140 F. Supp. 136, 151.

or interest from the defendant company and who may need that income for themselves and for their families. No sympathy of any sort for either side should play any part in your decision."

While this language is perhaps not what this court would have chosen we cannot hold that it was error for the trial judge so to charge under the circumstances. He was not, as the plaintiff argues, bringing into the case for the jury's consideration additional parties who had no place there, as was done in the cases which the plaintiff cites. On the contrary he was obviously seeking to eliminate all such extraneous parties on both sides from the jury's consideration and in this graphic way to make it clear to them that no sympathy of any sort for either side should play any part in their decision. A federal trial judge has the right, indeed the duty, to do this.[3] And he has a wide discretion as to the manner of doing it.

We must assume that jurors are intelligent and conscientious individuals, each with a background of knowledge and experience. They are not robots who come to the courthouse with minds tabula rasa and who respond mechanically to every impression they receive in the court room. On the contrary they are expected, as by explicit direction of the trial judge this jury were, to use their common sense and their experience in the affairs of life in evaluating the testimony and reaching a verdict. It would be naive to assume that a group of intelligent jurors did not know, what is common knowledge, that a large railroad corporation such as the defendant here is very likely to have among its stockholders widows and orphans who receive income from its dividends. To thus point out that sympathy might enter into the picture on the defendant's side as well as the sympathy for which the plaintiff's counsel had appealed, and to direct that all considerations of sympathy on either side be left wholly out of their delibera-

3. See N. Y. Central R. R. Co. v. Johnson, 1929, 279 U. S. 310, 318.

tions was in our view within the discretionary power of the trial judge in this case.

Another matter calling for additional comment relates to the charge of the trial judge with respect to the plaintiff's burden of proof. In this connection the trial judge said to the jury:

> "The plaintiff has the burden of proving to you by the weight or the fair preponderance of the evidence that the defendant or its employees, other than the plaintiff, did not provide her with a reasonably safe place to work and that this negligence caused, in whole or in part, this injury to plaintiff. If, after considering all the evidence, the question of whether or not the defendant or its employees, other than the plaintiff, of course, were negligent in failing to use reasonable care to provide plaintiff with a safe place to work is so evenly balanced in your mind that you have no conviction, then you must find for the defendant. It is her burden to convince you that there was this negligence. Also, if the question of whether or not such negligence was a factor in causing the injury is so evenly balanced in your mind that you have no conviction, then you must find for the defendant.
>
> . . .
>
> "Now, this is one of the big points for you, this question of whether the plaintiff has proved to you by a preponderance of the evidence that there was a failure to use reasonable care under all these circumstances. There she was with her galoshes, her overalls, her work jacket. The evidence must do more than raise a doubt in your mind on these points, if plaintiff is to sustain the burden. If there is just a doubt in your mind, you must bring in a verdict for the defendant, and that ends your consideration of the case. You don't need to go any further. On the other hand, if you are convinced by the preponderance of the evi-

dence that the defendant or its employees, other than the plaintiff, were negligent, and that this negligence was a factor in causing the injury, then you must find for the plaintiff.

. . .

"If you find for the plaintiff for the reasons stated above, then you must consider the damages. The mere fact that I instruct you on the subject of damages must not be considered as an indication of my views on whether or not the plaintiff has sustained her burden of proving that the defendant or its employees were negligent in failing to provide her with a safe place to work. If you find that the plaintiff sustained the burden of proving the defendant negligent, through its failure to use reasonable care in providing a safe place to work, then you must carefully consider all the following elements of damage: First, loss of past earnings; second, loss of future earnings; third, pain, suffering, injuries, mental and physical; fourth, medical expenses, past and future.

. . .

". . . I must point out to you the various possibilities in accordance with the contentions of counsel, and it is for you to find the facts, and nothing I said should be allowed to make you feel that the plaintiff had not sustained her burden of proving this case or that she had. That is for you to decide. That is your problem. All I can tell you is the law, which is that the defendant has the duty to use reasonable care and to provide this plaintiff with a reasonably safe place to work under all the circumstances."

The plaintiff objects to these instructions upon three grounds. One is that it was error, as she argues, for the trial judge to use the words "conviction" and "convince" in explaining to the jury the nature of their fact finding

duty in this civil case. Another is that it was equally erroneous to use the word "doubt" for that purpose. The third is that it was error in the two portions of the charge last quoted not to add to each reference to the plaintiff's burden of proof the statement that the proof need only be made by a preponderance of the evidence. We are satisfied that there is no merit in the plaintiff's contentions in this regard and that the portions of the charge which we have quoted, considered as a whole, adequately informed the jury as to their legal duty in the case. The problem involved in the first two contentions, however, calls for a little more searching analysis than is customarily given to it. For we are here dealing with ancient legal phrases, cliches which may have precise meaning for judges and lawyers but which must be far less than clear to lay jurors.[4] It is, however, with the success of these statements in illuminating the minds of jurors as to their fact finding duty that we must be concerned.

The classical statement of the burden of proof in an ordinary civil case such as this is that the facts must be proved by a "preponderance of the evidence". But there are obvious difficulties with this metaphorical description of the plaintiff's burden of persuasion. It does not refer directly to the fact finding process itself but merely to the character of the evidence required and even there is less than clear since it refers only to the "weight" of the evidence. The latter ambiguity is perhaps cleared up by the usual statement to the effect that "preponderance" is not dependent upon the number of witnesses testifying on either side but rather upon the credibility which, in the

4. This is graphically indicated by the results of a questionnaire sent to former jurors by Judge Walter B. Wanamaker of Akron, Ohio. In answer to the question, "What propositions of law were most difficult to understand?" the answers were:

"a. Preponderance of the evidence	232
b. Reasonable doubt	136
c. Negligence	110
d. Proximate cause	203."

Trial by Jury, 1937, 11 U. of Cin. L. Rev. 119, 192.

light of all the evidence in the case, the jury attributes to their testimony and the effect of that testimony in inducing belief in its truth. But even so, it has been suggested with much force that the use of this ancient metaphor referring, as it does, to the "greater weight" of evidence is intrinsically of very limited usefulness in giving to a juror real guidance as to his duty.[5] One cannot weigh evidence as on a scale. Certainly no mechanical device is available to jurors to measure the truthfulness of a witness or the accuracy of his memory.

Moreover, as we have suggested, the "preponderance of the evidence" formulation is not directed to the basic procedural problem confronting the jury, that is, the degree of accuracy in finding the facts which they are being asked to employ in reaching their verdict in a civil case. Certainly they are not required to find the facts to an absolute certainty or even beyond a reasonable doubt, as in a criminal case. But we do not think it is wrong to say, as the trial judge in this case did, that the jury must be *convinced* by the fair preponderance of the evidence that the facts were as the plaintiff asserted them to be.

It would doubtless be much more comprehensible to a jury if they were told, as Professor McBaine has suggested in his thoughtful essay on the subject,[6] that the plaintiff's burden is to convince them upon all the evidence before them that the facts asserted by the plaintiff are more probably true than false.[7] This, we think, is the intended effect of

5. See Judge Frank's discussion of the subject in Larson v. Jo Ann Cab Corp., 2 Cir. 1954, 209 F. 2d 929. See also McBaine, Burden of Proof: Degrees of Belief, 1944, 32 Cal. L. Rev. 242, 247; McCormick on Evidence, 1954, p. 676.

6. McBaine, Burden of Proof: Degrees of Belief, 1944, 32 Cal. L. Rev. 242, 262. And see Morgan, The Law of Evidence, 1941-1945, 59 Harv. L. Rev. 481, 492-493, and McCormick on Evidence, 1954, p. 677.

7. In Beckwith v. Town of Stratford, 1942, 129 Conn. 506, 29 A. 2d 775, Chief Justice Maltbie described the standard of proof in a civil case as "proof which produces 'a reasonable belief of the probability of the existence of the material facts' ". Likewise in Moffie v. Slawsby, 1915, 77 N. H. 555, 94 A. 193, Chief Justice Parsons said:

the "preponderance of the evidence" rule and it would place the emphasis upon the nature of the function which the jurors are being asked to perform and the degree of belief which must be produced in their minds before the plaintiff is entitled to a favorable finding from them.

In any event there must surely be a conviction in the minds of the jurors before they may bring in a verdict for the plaintiff. They must be convinced or satisfied [8] in their minds that the plaintiff is entitled to their verdict. This, of course, need not be a conviction of the certainty of the facts they find,[9] but they must at least be convinced that the evidence considered as a whole, its "preponderance" to use the traditional term, indicates that the facts asserted by the plaintiff are probably true. The contrast here is between two different states of mind, a state of belief and a state of doubt or uncertainty. If, as the trial judge suggested in his charge in this case, the eivdence merely raises a doubt in the jurors' minds as to whether or not the facts asserted by the plaintiff are true or if in their minds the probabilities of those facts being true or false appear equal the plaintiff has not met his burden of proof and a finding for the plaintiff would be inconsistent with the jurors' duty to render a true verdict.

We are satisfied that in the portions of the charge to which the plaintiff objects and which we have quoted above the trial judge adequately explained to the jury their duty in this regard. We are not impressed with the plaintiff's contention that the trial judge should have included a specific reference to the preponderance rule or its equiva-

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"In the ordinary civil case, the issues are decided by a balance of probabilities. . . . When the party having the affirmative of the issue has established the probable truth of his contentions, he has met the burden resting upon him." And see Northwest States Utilities Co. v. Ashton, 1937, 51 Wyo. 168, 65 P. 2d 235; Mutual Life Ins. Co. of New York v. Springer, 1937, 193 Ark. 990, 104 S. W. 2d 195; 20 Am. Jur., Evidence, §§ 1249, 1250.

8. In this setting the two verbs appear to be synonyms.

9. Murphy v. Waterhouse, 1896, 113 Cal. 467, 45 P. 866; 20 Am. Jur., Evidence, §§ 1249, 1250.

lent in connection with each of the references which he made later in his charge to the plaintiff's burden of proof. He had already adequately, as we have pointed out, instructed the jury as to their duty to follow the preponderance rule and we certainly cannot say that it was error not thus to reiterate summary references to that rule.

The other matter upon which we shall comment briefly relates to the instructions given by the trial judge with respect to the defendant's duty to provide the plaintiff with a safe place to work. The following portion of the charge is objected to:

> "Reasonableness varies with the place and the danger of the work, Less diligence is required to constitute reasonable care where the danger is slight than would be required where the danger is great. If you find that the injury resulted from an accidental slip on one of a few pebbles, neither the defendant nor the plaintiff could be said to be negligent, and you must find a verdict for the defendant, of course. The railroad isn't responsible for accidents. They might happen anywhere."

In considering the object raised to this language it must be borne in mind that the trial judge affirmed and read to the jury 8 of the plaintiff' points for charge which related to the applicable principles of law with respect to the defendant's duty to provide the plaintiff with a safe place to work. Among these were the plaintiff's 7th point, as follows:

> "7. If you find that the plaintiff slipped, tripped or fell because of the presence of loose stones or pebbles which were present in the highway where she was obliged to work or where the defendant knew or should have known she would be working and that such condition was one which the railroad company knew or should have known was one which might cause her to fall and suffer injury, then you may find that the failure

of the railroad company to make the place reasonably safe or to provide a reasonably safer way for the plaintiff to perform her duties was negligence. If you find that the plaintiff sustained her injuries in whole or in part by reason of such negligence on the part of the defendant railroad company then your verdict must be for the plaintiff."

It must also be remembered that the plaintiff's place of work at the time of her injury was on a public street upon which she slipped and fell. The evidence was sharply conflicting as to whether the street was in a dangerous condition, being covered with loose pebbles, or whether it provided a safe surface for walking with only a few pebbles scattered here and there. In the light of the charge as a whole and the affirmance of the plaintiff's points the instruction complained of permitted the jury to find that the street upon which the plaintiff was walking was a reasonably safe place to work and that her injuries were the result of a purely accidental slip by her on one of a few pebbles. This was not error. For contrary to the rule under workmen's compensation acts the Federal Employers' Liability Act does not impose liability without fault and there is, therefore, no liability on the part of an employer under that Act for injuries suffered by an employee as a result of a pure accident occurring while working in a reasonably safe place.

The judgment of the district court will be affirmed.

KALODNER, *Circuit Judge*, dissenting

I disagree with the majority's view that the trial judge was acting within his discretionary power when he made reference in his charge to ". . . widows and orphans who may be receiving dividends or interest from the defendant company and who may need that income for themselves and their families. . . ."

In my opinion the injection into the case of the pecuniary interest of widows and orphans dependent upon income

from their investment in the defendant railroad company's securities constituted prejudicial error requiring reversal.

Two wrongs don't make a right.

Plaintiff's counsel was clearly out of bounds when he injected into the case the fact that the plaintiff had raised two foundlings (long since grown up) as her own and at least inferentially appealed for a verdict which would permit further such philanthropy on her part. His conduct warranted withdrawal of a juror or at the very least a vigorous caution to the jury to disregard this unjustifiable attempt to invoke its sympathy. The trial judge chose to take neither one of these available steps but on the other hand, no doubt unwittingly, chose, as the majority put it, "to neutralize any possible prejudice resulting from this appeal on behalf of non-existent 'little children.' "[1]

I fully subscribe to the majority's view as to the trial judge's motive but we cannot give judicial sanction to fighting fire with fire. Here the trial judge sought to extinguish the flame of sympathy for foundlings ignited by plaintiff's counsel with a countering flame of sympathy for widows and orphans. Neither the foundlings nor the widows and orphans were parties to this litigation and their injection into the case was violative of the rights of the respective parties and constituted reversible prejudicial error. Cf. Knight v. Allegheny County, 377 Pa. 502 (1954) and Narcisco v. Mauch Chunk Township, 369 Pa. 549 (1952).

As to the trial judge's instructions with respect to the plaintiff's burden of proof.

In the first two portions of the trial judge's charge which the majority quotes he twice instructed the jury that

1. The trial judge put it this way in his opinion reported at 140 F. Supp. 136 (E. D. Pa. 1956), at page 151:

"In view of this emphasis on these 'little children' and the plaintiff having something to leave to those 'who are near and dear to her,' the trial judge felt it was his duty to neutralize any possible prejudice by including in his charge a sentence indicating that there might be those interested in the defendant who were also in need and included the following paragraph in his charge:"

it must find for the defendant if it had "no conviction" and also twice instructed it that it must be "convinced" of the defendant railroad's negligence supplementing those instructions with the admonition that "If there is just a doubt in your mind, you must bring in a verdict for the defendant . . . ."

I disagree with the majority's view that the instructions stated did not constitute prejudicial error.

As was stated by Judge Frank in Larson v. Jo Ann Cab Corp., 209 F.2d 929, 930, 935 (2d Cir. 1954):

> "Courts and commentators have said that, in the ordinary civil suit, usually a judge commits reversible error if he instructs the jury that the plaintiff cannot recover unless he 'convinces' them (or the like). Such a charge, it is maintained indicates something midway between a 'preponderance' and 'beyond a reasonable doubt,' and should therefore be reserved for certain exceptional sorts of civil cases where more than a 'preponderance' is required . . . Nevertheless . . . we think we should adhere to the ruling that, in the ordinary civil suits . . . words like 'convince' and 'conviction' should be shunned in a jury charge."[2]

In common parlance "conviction" is synonymous with "certainty" and "convince" is "to cause to feel certain."[3]

In instructing the jury that it must find for the defendant if it had "no conviction" and that plaintiff had the burden "to convince" it that defendant was negligent, the trial judge imposed a burden of proof on plaintiff far in excess of that imposed by the "preponderance of the evidence" rule.

In Nelson v. Lee, 32 S.2d 22, 24 (1947) the Supreme Court of Alabama held that reversible error was committed by the trial judge in giving the following instruction:

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2. In that case no exception was taken to the charge as made and the Court held it was not adequately reserved for review.

3. Webster's New World Dictionary of the American Language, College Ed. 1956.

> "I charge you, gentlemen of the jury, that if after a consideration of all the evidence in this case your minds are left in a state of doubt and uncertainty so that you are not reasonably satisfied from the evidence that on the occasion complained of the defendant was guilty of negligence in and about the transportation, handling or removal of the rifle in question you cannot return a verdict in favor of the plaintiff and against the defendant."

In doing so it stated that ". . . this charge placed too high a degree of proof upon the plaintiff."

The same court in the recent case of Hill Grocery Co. v. Wilson, decided September 13, 1956, 89 S.2d 687, ruled that the trial judge had correctly, on a motion for a new trial held that he had committed prejudicial error when he had given the following instructions to the jury:

> ". . . Where the evidence leaves it uncertain as to whether the cause of the injury was something for which the defendant was responsible, or something for which the defendant was not responsible, there is a failure of proof, and unless you are reasonably satisfied from the evidence in this case that the negligence of the defendant, if any, was the proximate cause of the injuries sustained by Mrs. Wilson, you cannot return a verdict in favor of the plaintiff and against the defendant."

In ruling that the trial judge had acted correctly in granting a new trial the Supreme Court of Alabama said of the instructions which had been held to be prejudicial error:

> ". . . if the jury had the slightest uncertainty as to whether the defendant was responsible for the injury, they were required to find that there was failure of proof as to such fact. The effect of the charge is to place the burden upon the plaintiff to show beyond all uncertainty that the defendant was responsible for the

injury sustained by the plaintiff. As pointed out in the foregoing authorities, the charge places too high a degree of proof upon the plaintiff."

In Botta v. Brunner, 42 N.J. Super 95 (1956), the Appellate Division of the Superior Court of New Jersey held that the trial judge had committed prejudicial error when he charged the jury that it was incumbent upon the plaintiff ". . . to prove by *clear convincing evidence* that her injuries were the result of the accident," and that "The evidence must, therefore, establish *with reasonable certainty* that the injuries and losses for which you award any damages are properly attributable to the accident." With respect to these instructions the Court stated:

> "There can be no doubt that the court's imposition upon plaintiff of the burden of producing 'clear, convincing' evidence that her claimed 'injuries' easily to be understood by the jury in the added sense of disabilities, were the result of the accident, assessed her with a probative burden exceeding what the law calls for in an ordinary civil action."

In Johnson v. Erie Railroad Company, 236 F.2d 352, 354, 355 (2d Cir. 1956), after correctly charging the jury with respect to the burden of proof the trial judge went on to say:

> "It is up to you ladies and gentlemen to determine whether the evidence adduced before you shows with *reasonable certainty* that the plaintiff's alleged injury or future disability, if you find he has any, resulted from the aggravation of the previous condition, or, rather from the previous condition itself, in order to warrant a recovery of damages in this case."

The Appellate Court held that the instruction given was erroneous, stating:

> ". . . At least as to injuries actually suffered prior to the trial, it was incumbent on the plaintiff to prove a

causal connection with the defendant's negligence only by a fair preponderance of the evidence; *to require proof to 'a reasonable certainty' imposed an excessive burden.*" (Emphasis supplied)

The Court also held erroneous the following instruction:

". . . I don't want to review that evidence, but it is up to you to decide whether you want to believe one or the other, because *if you have any doubt about it* then he (the plaintiff) has not sustained the burden of proof which the law imposes upon him."

Said the Court of that instruction:

"That instruction was erroneous. Notwithstanding a doubt thus engendered a jury might yet properly find that the plaintiff has sustained the burden under which he labored."

In the third and fourth portions of the trial judge's instruction relating to plaintiff's burden of proof, quoted by the majority the jury was thrice told that plaintiff must sustain "the burden of proving" the defendant's negligence. That of course was reversible error since the instructions omitted any reference to a "fair preponderance of the evidence."

In Se-Ling Hosiery, Inc. v. Margulies, 364 Pa. 45 (1950), the trial judge instructed the jury in a civil action that the plaintiff "had the burden of proof" and did not add the phrase "by the fair preponderance of the evidence." Said the Court at page 50:

". . . If a trial judge in a civil case instructs the jury that plaintiff 'has the burden of proof' the defendant has no cause for complaint, because of what is implicit in that phrase when it stands alone. *However, a plaintiff would have grounds for complaint if the jury was not instructed that 'burden of proof' in a civil case meant only 'by the fair preponderance of the evidence'*

the members of the jury might have the idea that the phrase 'burden of proof' meant some higher degree of proof than mere preponderating evidence. Therefore, the omission of the phrase 'by the fair preponderance of the evidence' in the judge's charge in the instant case was something of which the plaintiff could have justly complained . . ." (Emphasis supplied)

With respect to the sum total of the instructions as to burden of proof, above discussed, the following statement made in Johnson v. Erie Railroad Company, supra, at page 156 is particularly appropriate:

"We need not consider how far separately each of the statements referred to would require reversal, since the cumulative effect of the several references is such as to make the possibility of confusion too great to disregard. We think the plaintiff entitled to a new trial."

Because of the view expressed that a new trial should be granted because of the trial judge's erroneous and confusing instructions relating to the plaintiff's burden of proof, it is unnecessary to dwell at length on her contention respecting the trial judge's instruction that

". . . If you find that the injury resulted from an accidental slip on one of a few pebbles, neither the defendant nor the plaintiff could be said to be negligent, and you must find a verdict for the defendant."

I subscribe to the plaintiff's contention that this instruction was erroneous because it inferentially ruled that there was no absolute duty on the part of the defendant to provide plaintiff a reasonably safe place to work and operated in effect to remove from the jury's consideration the "safe place to work" issue.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF,
Clerk.

January 8, 1957.

No. 886

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 11,908

LUCILLE H. BURCH,

Appellant,

v.

READING COMPANY,

Appeal from the Judgment of the United States District Court for the Eastern District of Pennsylvania

BRIEF FOR APPELLEE AND APPENDIX

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COUNTER-STATEMENT OF QUESTIONS INVOLVED.

I. Did the Court err in directing the jury to disregard certain testimony of a plaintiff's witness and certain documents introduced by plaintiff in an attempt to establish that plaintiff was injured due to defendant's negligence in requiring plaintiff, a woman, to perform work too heavy for her, where neither the testimony nor the documents supported the contention, plaintiff herself testified that she was capable of performing heavy work, the testimony established that she was actually doing light work at the time of her accident, and there was no evidence that her fall was due to the type of work then being performed by her?

II. Where the closing argument of counsel for plaintiff contained statements, designed to arouse the sympathy of the jury and unsupported by any testimony, implying that plaintiff should receive a substantial verdict to assist in supporting two small children, was it error for the Court to endeavor to counteract this appeal by charging that the jury "should no more be swayed by sympathy for the plaintiff than for the widows and orphans who may be receiving dividends or interest from the defendant company and who may need that income for themselves and their families" and that no sympathy of any sort for either side should play a part in the decision?

III. Was it error to instruct the jury that, in considering whether defendant used reasonable care to provide plaintiff with a safe place to work, the jury should consider whether defendant had sufficient notice of any allegedly unsafe condition, where only one hour had elapsed since work started at the scene?

IV. Was it error to instruct the jury that if they should find that the injury resulted from an accidental slip on one of a few pebbles, neither the plaintiff nor the defendant could be said to be negligent, where the pleadings and the arguments of counsel raised, and the testimony supported, that possible defense?

V. Was it error for the Court to use the words "doubt" and "convince" in the course of charging that plaintiff had the burden of proving defendant's negligence by a preponderance of the evidence?

VI. Was the charge of the Court fair?

COUNTER-STATEMENT OF FACTS.

Plaintiff brought the above-captioned action for injuries allegedly sustained by her when she fell at Scotts Lane crossing, East Falls, Philadelphia, while she was working as a track laborer, on or about November 27, 1950.

At the trial, November 15 through November 18, 1955, before Judge Van Dusen and a jury, the testimony, summarized briefly, was as follows:

Plaintiff testified that she went to work for Reading Company in 1944 as a section laborer; that with a gang of other laborers she went to Scotts Lane crossing at about 7 o'clock on the morning of November 27, 1950, to make repairs by filling in holes under the rails of defendant's tracks; that she was 5 feet 4 inches tall and weighed 180 to 185 pounds (73a) that it was her job to dig dirt out of a pile alongside the crossing and carry it to the point on the crossing where the holes were located; and that while walking from the rail to the pile of dirt, carrying an empty shovel, she fell, about 8:15 a.m. She testified that she fell upon the paved surface of the street about 3 feet south of the rail and about 2½ feet in from the edge of the street; that she was wearing galoshes, overalls and a jacket; that when she fell she could feel her feet rolling out from under her and could feel pebbles about the size of her little fingernail (25a); and that the street was worn out and covered with hundreds of pebbles all the way down from the rails (25a).

She testified that she was taken to the hospital and her ankle placed in a cast, which was replaced from time to time by other casts; she received treatment at Women's Medical College Hospital, Philadelphia General Hospital and Temple University Hospital for a period of five years; that she was advised by the Company doctors to walk without the cast, but she was unable to do so (32a); and that she cannot now walk well without the crutches or cane.

Upon cross-examination, plaintiff admitted that she was hired to do the same work as male track laborers, lifting ties, working on rails, pulling spikes out of rails, and shoveling ballast, (46a-47a) and that she was able to do that type of work continuously for six years prior to the accident (48a); that she was accustomed to working on ballast which was dumped loosely in between the ties along the track by a machine (47a); that at the crossing there were pebbles all the way from the rails to the bottom of the hill, a distance in excess of 100 feet (25a, 55a); that she saw the pebbles on the street before she fell (55a); and that she walked just as carefully as she could doing her work, but the accident happened (55a). Plaintiff further admitted that at the hearing in January 1951 held by defendant two months after the accident, she testified that she did not know what caused her to fall, she did not know the condition of the street and did not mention the existence of any pebbles (63a-71a).

Joseph E. Osborne, Field Supervisor of the Department of Streets of the City of Philadelphia, testified that he went to Scotts Lane crossing to supervise the repaving of it in April 1951, five months after the accident, (123a), and that at that time the street was full of holes, depressions and cracks, and there was a steep grade (123a-129a).

Upon cross-examination, Mr. Osborne stated that he could not testify of his own knowledge as to the condition of Scotts Lane in November of 1950, or whether it was the same as in April 1951 (129a), or whether there was any hole within 3 or 4 feet of where plaintiff fell (131a), because he only drove over it once or twice a month; that Scotts Lane was repaved in 1951 as the result of a City ordinance approved May 24, 1950, six months prior to plaintiff's fall (131a); and that it was usual for the Department of Public Works to introduce such an ordinance if it considered the repaving necessary; but that he did not know whether the particular ordinance in question was introduced at the request of property owners adjacent to the street (132a-3a).

In an effort to show that the plaintiff, at the time of her accident, was performing work which she should not have been required to do and which was imposed upon her by her immediate supervisors without the approval of the management of defendant (40a-42a), counsel for plaintiff called R. W. Morrison, Track Supervisor of Reading Company, and confronted him with a memorandum dated April 20, 1949, relating to a certain train trip to be made by defendant's Board of Directors on April 26, 1949 (1½ years prior to the accident) which contained, *inter alia*, the following sentence: "• • • also make general clean-up of papers, rubbish, and so forth, on your section, and keep your women laborers out of sight when this train passes." Mr. Morrison testified, contrary to the contention of plaintiff's counsel, that the above-described sentence was placed in the memorandum because he did not wish to be criticized by the Board of Directors who were riding upon the train, if they were to see women laborers doing light work, such as picking up papers, rather than the usual heavy work for which track laborers are customarily assigned (153a-4a); and that the Board of Directors knew that the railroad employed women laborers to do hard track labor (155a).

Plaintiff produced no testimony to show that the memorandum in question was written for the purpose of concealing from the Board of Directors the fact that women laborers were working at regular track labor, nor did plaintiff produce any testimony to show that the order contained in the memorandum bore any relation to the work being done by plaintiff on the date of her accident or in any way contributed to her accident. Plaintiff's foreman, DiLuzio, called in rebuttal by counsel for plaintiff, testified that he neither received the memorandum of April 20, 1949, nor had he discussed it with his supervisors (289a-290a). At the conclusion of the testimony, upon motion by counsel for defendant, the trial judge directed that the testimony of Mr. Morrison, the contents

of the memorandum and all other testimony relating to the subject of that memorandum be stricken and disregarded by the jurors.

Defendant produced plaintiff's foreman, DiLuzio, who testified that he came to the scene five minutes after the accident; that the street at the point where plaintiff fell was smooth and in good condition; that he saw a dirty or ashen colored heel or shoe mark where plaintiff fell; that there were only 20 or 30 scattered pebbles in the general area where she fell and only 1, 2 or 3 pebbles at the shoe mark (221a-2a).

Defendant likewise produced the testimony of Larry Chiolan, Plant Engineer of the Fred Whitaker Company, which was located adjacent to Scotts Lane Crossing. Mr. Chiolan testified that the contract for the repaving of Scotts Lane from Abbottsford Road to Ridge Avenue was let as a result of an ordinance which was introduced following negotiations between the Fred Whitaker Company and the City; that the Whitaker Company desired to have Scotts Lane widened in order to permit its large tractor-trailer trucks to enter the plant from Abbottsford Road; that he, himself, passed the crossing going to and from work at least twice every day during November of 1950 and that the condition of the road was generally good (231a-237a).

The testimony upon the issue of damages, insofar as it relates to the issues herein, will be discussed generally hereafter under the Argument section of this brief. After the charge of the Court, the jury retired and returned a verdict in favor of defendant. Plaintiff filed a motion for a new trial containing 37 allegations of error on the part of the Trial Judge in the handling of the trial. That motion was denied in an exhaustive Opinion and Order which is reported at 140 F. (2d) 136 and is set forth in Appellant's Appendix (376a-412a) and an Exhibit A thereto, set forth in Appellee's Appendix (1b). From the Order plaintiff has appealed.

ARGUMENT.

I. It was not error for the Court to direct the jury to disregard the testimony of plaintiff's witness Morrison and certain documents introduced by plaintiff in an effort to establish that defendant was negligent in compelling plaintiff to do work too heavy for her and that her fall resulted from that negligence.

It was one of the contentions of plaintiff that defendant was negligent in employing women laborers in a job which women should not have been doing (7a, 40a-42a). Counsel for plaintiff had in his possession certain memoranda addressed to plaintiff by defendant's track supervisor Morrison (plaintiff's Exhibits 8, 9 and 10) issued in 1948 and 1949, relating to certain hearings held as to the ability of women laborers, including plaintiff, to perform the duties of a track laborer. In addition, counsel for plaintiff had a copy of a memorandum dated April 20, 1949, stating as follows (146a):

> "April 20, 1949, sections 6, 7, 8, 9, 10, 11, 12, 13, and 14. There will be a road trip of Reading Company Board of Directors leaving Reading Terminal, Philadelphia, 11:00 A. M. Tuesday, April 26, and run via Norristown branch.
>
> "Returning this special will operate via Main Line and west side to 24th and Chestnut Streets, on Wednesday, April 27. Do not know exact time this train will arrive at 24th and Chestnut Streets. Arrange to keep in touch with dispatcher that day for time train will reach your section.
>
> "Also make general cleanup of papers, rubbish, and so forth, on your section, and keep your women laborers out of sight when this train passes.
>
> Signature, R. W. Morrison."

Counsel for plaintiff called Mr. Morrison as his witness, in an effort to establish that the memorandum of April 20, 1949, reflected a general policy on his part that women were to do heavy work, that Mr. Morrison's policy was contrary to the wishes of the Board of Directors, and that his orders were communicated to plaintiff (41a-2a).

Mr. Morrison, however, testified on the contrary that it was the policy of the company, known to the Board of Directors, that women track laborers were expected to perform the same kind of work as men track laborers, and that his instructions to "keep the women out of sight" were issued so that the Board of Directors would not see the women laborers doing light work such as picking up papers as described in the memorandum (146a-155a). He further testified that in the hearings referred to in plaintiff's Exhibits 9 and 10 in 1949 plaintiff stated that she felt she was able to do the work of a man (162a).

Likewise, plaintiff's foreman DiLuzio, called by plaintiff in rebuttal, testified that he never received the memorandum of April 20, 1949 from his superior. At the conclusion of the testimony the Court directed the jury to disregard Mr. Morrison's testimony and the memoranda.

Appellant now contends that the Court "ruled as a matter of law that appellant had failed to make out a case under the theory that appellee had subjected appellant to a job too hard for her to perform as a woman" (Appellant's Brief, p. 8). The Opinion and Order of the Court points out that the Court did not so rule as a matter of law and charged the jury to consider "the physical capabilities of the employee under the circumstances" in determining whether the defendant had exercised reasonable care, but merely granted defendant's motion to strike the testimony and instructed the jury to disregard it (383a and 385a, footnote 21). Appellee submits, however, that in any event the jury should not have been permitted to consider any testimony relating to this

issue and that a directed verdict in defendant's favor upon it would have been proper.

From the review of the testimony of Mr. Morrison and the memoranda described above, it is apparent that plaintiff failed to make out a cause of action upon the theory that defendant was negligent in permitting plaintiff to engage in the kind of work she was doing at the time of the accident. This is so for several reasons:

(1) Plaintiff failed to establish by the testimony of any witness that Mr. Morrison's memorandum of April 20, 1949, was written because the Company's management did not approve of the use of women as track laborers doing the same work as men. In fact, the testimony was to the opposite effect;

(2) Plaintiff failed to establish that the order contained in the memorandum was ever communicated to plaintiff or her foreman, either about the time of the accident, or at any earlier time; and

(3) Plaintiff failed to establish that there was any causal relationship between the kind of work which plaintiff was doing as a female track laborer and her fall, since plaintiff testified that she was capable of doing heavy work, and there was testimony that she was actually doing light work at the time.

Numerous authorities support the action of the learned Trial Judge in this respect.

In *Brady* v. *Southern Railway Co.*, 320 U. S. 476 (1943), the United States Supreme Court, in affirming the decision of the Supreme Court of North Carolina, holding that the case was improperly submitted to the jury, stated (at pages 479-80):

"The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion

of the trier of fact—in this case, the jury. *Western & Atlantic R. Co.* v. *Hughes, supra; Baltimore & Ohio R. Co.* v. *Groeger,* 266 U. S. 521, 524. Cf. *Gunning* v. *Cooley,* 281 U. S. 90, 94; *Commissioners* v. *Clark,* 94 U. S. 278, 284. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. *Galloway* v. *United States,* 319 U. S. 372; *Pence* v. *United States,* 316 U. S. 332; *Baltimore & Ohio R. Co.* v. *Groeger,* 266 U. S. 521, n. 1; *Anderson* v. *Smith,* 226 U. S. 439; *Coughran* v. *Bigelow,* 164 U. S. 301, 307; *Gunning* v. *Cooley,* 281 U. S. 90, 93 note, *Seaboard Air Line* v. *Padgett,* 236 U. S. 668, 673; *Parks* v. *Ross,* 11 How. 362, 373. See IX Wigmore on Evidence (3d ed., 1940), §§ 2494 *et seq.*"

Likewise, in *Chesapeake & Ohio Ry. Co.* v. *Thomas,* 198 F (2d) 783 (C. A. 4, 1952), the Court of Appeals, in holding that one of three issues should not have been submitted by the trial court to the jury, stated (at page 788):

"We are well aware of the line of cases decided by the Supreme Court on the functions of the court and the court and the jury under the Federal Employers' Liability Act and the proposition they established that an appellate court must not take cases out of the jury's hands or uphold such action where any basis whatsoever for submission is revealed by the evidence [citing authorities]. But this does not mean that such an appellate function is eliminated under the Act, or that reversal is not justified upon

'a complete lack of probative facts to support the conclusion reached.' *Lavender* v. *Kurn, supra,* 327 U. S., at page 653, 66 S. Ct. 744. To allow such a question as is here involved to reach the jury would be to mask a wisp of suspicion with the cloak of hard fact."

This problem has been discussed in detail in a recent Pennsylvania case, *Finnegan* v. *Monongahela Con. R.R. Co.,* 379 Pa. 63 (1954). In an opinion which analyzes all of the recent Federal cases upon the right of the court to withdraw an issue from the jury in a case arising under the Federal Employers' Liability Act, the Pennsylvania Supreme Court entered judgment for defendant *n.o.v.* The court stated (at page 72-3):

> "The conclusion is inevitable that on no theory advanced by the plaintiff is there evidential support for a finding that defendant was negligent. Moreover, even if we assume that defendant was negligent, plaintiff still cannot recover because the presence of the steel in the passageway or elsewhere was not the proximate cause of plaintiff's injury."

For the above reasons, and the reasons so ably set forth in the Opinion and Order of the Court (383a-8a) Appellee submits that the Court did not err in directing the jury to disregard the testimony of Mr. Morrison and the memoranda in question.

II. The Court did not err in the portion of its charge relating to sympathy and prejudice, given in an effort to counteract the appeal to sympathy and prejudice made in the closing of argument of counsel for plaintiff.

At the trial plaintiff testified as follows (11a-12a):

> "Q. How old are you?
> A. 55.

Q. And are you married?
A. I am a widow.
Q. Do you have any children?
A. I have two I raised. They are grown now.
Q. Two that you raised?
A. Yes.
Q. They are not your own, but you raised these two children?
A. Yes.
Q. And they are both grown, you say?
A. Yes.
Q. Are they married and off on their own?
A. One is.
Q. I see. Does the other one live with you?
A. No, sir."

In spite of this testimony, counsel for plaintiff made the following appeal to the jury in the course of his argument at the close of the testimony (303a):

"That is for five long years she would have made $60 or $62 a week, whatever it amounts to, and she would have had that $15,000 to spend on herself, and, yes, to be a human being herself, too, and to continue to do the same kind of decent thing she did before when she took two colored foundlings and raised them as her own, when she raised two little children like her own, and gave to them a mother's feeling, a mother's care.

"If she wanted to spend it on those little children, she had a right to do it. She had a right to have that $15,000 coming into her home, slowly in small amounts, save a dollar, do something that would give her pleasure; and her pleasures in her simple way were not fancy dress and fancy living, but being a mother to little children that needed it. I think that nothing bespeaks more wondrously for this fine little woman than what she actually did, because her acts speak louder than words."

And further (307a-8a):

"Please try to approach this case thinking this thought in mind: Do only what's right. Give her not one penny more than what she should get, but let her be provided for in the style to which she was living before, not higher, no higher station, a little humble apartment on North 13th Street where she lived then. That is what she needs now. She wants to be able to pay her rent, to pay her grocery bill, to buy a winter coat, to make sure the place is warm, to be able to have a few dollars left over to save for the day when she wouldn't have a job, so that when the time comes that ordinarily she would have retired, she can live on the annuity that will pay to her week by week, because I give you my word that as I have striven on her behalf out of respect for her, out of respect for her as a human being, to see to it that her case is fairly presented and her rights protected here, so I give you my solemn word that whatever this woman gets will be protected for her with some substantial life insurance company, so that she will be paid by them week by week and year by year, and if she should pass away from this world before that time, let her leave to those who are near and dear to her what any of us would leave if we had accumulations that we wanted to leave to our family or those that were dear to us. Whatever she wants to do with her money that she is justly entitled to, may she do it and do it with all our blessings."

The testimony quoted above was the only testimony relating to the existence of plaintiff's alleged foster children; it established that they were now grown up, that they did not live with plaintiff, and there was no testimony that she had contributed to their support at any time in the immediate past; nor was there any evidence that they were her rightful heirs. Despite these facts,

counsel for plaintiff made an obvious attempt to appeal to the sympathy of the jury by conveying the impression that plaintiff needed, and was entitled to a substantial sum, so that she could provide for two little children.

In its charge to the jury, the Court endeavored to counteract this misleading impression and appeal by stating as follows (325a):

> "If you are sympathetic or prejudiced in favor of or against either the plaintiff or the defendant, you should not allow such sympathy or prejudice to influence you at all in your verdict. You should no more be swayed by sympathy for the plaintiff than for the widows and orphans who may be receiving dividends or interest from the defendant company and who may need that income for themselves and for their families. No sympathy of any sort for either side should play any part in your decision."

It is of course axiomatic that Federal Trial Judges have a duty to act upon their own motion to counteract irrelevant, prejudicial remarks of counsel: *Chicago & Northwestern Ry. Co.* v. *Kelly*, 74 F. (2d) 31 (C. C. A. 8, 1934); *Hockaday* v. *Red Line, Inc.*, 174 F. (2d) 154 (C. A. D. C., 1949); *New York Central R. R. Co.* v. *Johnson*, 279 U. S. 310, 318 (1929).

Appellant contends, however (Appellant's Brief, pages 26-28), that the Court erred in creating an inference that there were parties in the case other than the parties of record who might be affected by the verdict. Appellant cites *Knight* v. *Allegheny County*, 377 Pa. 502, 105 A. (2d) 141 (1954), and *Narcisco* v. *Mauch Chunk Township*, 369 Pa. 549, 87 A. (2d) 233 (1952), as examples of improper conduct by counsel in introducing such inferences into a case. Appellee submits that the language of those cases (quoted at length in Appellant's Brief at pages 26 and 27) is directly applicable to the conduct of counsel

for plaintiff in his summation. That summation, Appellee submits, is a classic example of the introduction by counsel into a jury's consideration, of a false inference that there are persons who are not parties to the action and who would be affected by the judgment therein, namely, the two alleged foster children of plaintiff. The argument of counsel for plaintiff was designed not only to appeal to the juror's sympathy for a widow and two "little children," but also to excite the prejudice of the jury in her favor and against the defendant corporation.

In its charge to the jury, the Court used an example which not only served to make clear that there should be no more sympathy in favor of the individual plaintiff than the corporate defendant, but also served to point out that the interest of the two unnamed "little" foster children was at least as remote from the issues of the case as was that of any widows and orphans who might be stockholders of defendant, and dependent upon it for their support. The fact that such a thought may not heretofore have been expressed in charges in cases participated in by counsel for plaintiff does not detract from the validity of that thought.

For the above reasons, as well as those aptly set forth in the Opinion and Order of the Court (393a-4a), Appellant submits that the charge of the Court above quoted contained no prejudicial error.

III. It was not error to instruct the jury that, in considering whether defendant used reasonable care to provide plaintiff with a safe place to work, the jury should consider whether defendant had sufficient notice of an allegedly unsafe condition where only one hour had elapsed since work started at the scene.

In its charge to the jury the Court read plaintiff's point for charge No. 8 as follows (339a-40a):

> "The duty of providing a reasonably safe place to work imposes upon the employer the affirmative

duty of inspecting the place where its employees are to work and imposes a duty on the employer to search out defects or hazards which would normally be revealed thereby and the failure to make such reasonable inspection or to learn of the conditions which a reasonable inspection would reveal is negligence. If you find that the plaintiff in this case suffered her injuries, in whole or in part, because such an inspection was not made and therefore, not corrected, then your verdict must be for the plaintiff."

At another point in its charge (330a) the Court charged the jury as follows:

"Even if you believe plaintiff's position that there were so many pebbles that an unsafe condition existed, you must consider, among other things, whether the defendant's foreman, Mr. Di Luzio, who was the defendant's chief representative on the scene, should have had notice of this condition, in view of the fact that only an hour, approximately, elapsed between the time work started at this location and the time of the accident and the fact that plaintiff herself admitted that all the other workmen, except the man loosening the dirt in the pile of dirt for her, were on the other side of the track.

"You must decide whether this condition existed long enough so that the defendant, under all the circumstances, could be said to have failed to have used reasonable care in not removing the pebbles by sweeping or otherwise."

It should be noted that plaintiff, in her requests for charge, did not request the Court to instruct the jury that the defendant had a duty of antecedent inspection, but only a duty of inspection (362a-3a). The charge of the Court was thus in conformity with plaintiff's request.

Appellant now contends, however, that the Court should further have charged that the defendant was under

a duty of antecedent inspection. Appellant asserts in her Brief (page 32):

> "A master is under a duty at all times to make an *antecedent* inspection of the place where it directs its employees to work *before* they begin working there."

Appellee submits that this is an incorrect statement of the law, and that the cases cited by Appellant in this portion of her brief do not support that statement.

It must be borne in mind that the right of action given to railroad employees under the Federal Employers' Liability Act permits the employee to recover "for such injury resulting in whole or in part from the negligence of any of the officers, agents, or employee of the carrier." The common law principles of negligence have thus been incorporated into, rather than supplanted by, the standard of care set forth in the Federal Employers' Liability Act. Appellant's contention is, in effect, that the defendant railroad is under an absolute duty to provide an employee with a reasonably safe place to work, and that if the place proves to be unsafe, the existence of that unsafe condition is, in itself, negligence *per se*. Defendant submits that this contention is incorrect in two respects.

First, the duty imposed by law is that the employer shall exercise *reasonable care* to provide the employee with a safe place to work, not that the employer is under an absolute duty to provide a safe place to work. It is a long established principle of law that in determining whether a person has used reasonable care where an unsafe or defective condition is disclosed either upon his premises or upon premises where his employees work, it is necessary for the plaintiff to establish that the unsafe condition existed for a sufficient period of time prior to the injury so that the defendant had knowledge or notice of its existence in sufficient time to take steps to remedy the condition. The law is no different in this respect

as to railroad employers and employees than it is with rspect to other persons. See *Kaminski* v. *Chicago River and Indiana R. Co.*, 200 F. (2d) 1 (C. A. 7, 1952); *Frizzell* v. *Wabash R. Co.*, 199 F. (2d) 153 (C. A. 8, 1952); *Wetherbee* v. *E. J. and E. Ry. Co.*, 191 F. (2d) 302 (C. A. 7, 1951); *Beattie* v. *E. J. and E. Ry. Co.*, 217 F. (2d) 863 (C. A. 7, 1954); *Finnegan* v. *Monongahela Connecting R. Co.*, 379 Pa. 63, 108 A. (2d) 321 (1954).

In the *Kaminski* case, plaintiff, a conductor, sued his employer for injuries received when he fell through a hole into an empty coal pit on the premises of an industrial concern while walking along the concern's tracks for the purpose of checking car numbers. After a verdict for plaintiff, defendant's motion for judgment *n.o.v.* was denied; thereafter the appellate court reversed the judgment of the District Court and directed that judgment be entered for defendant. The court stated (page 3):

> "In the instant case, the defendant did not own, maintain, or control the premises upon which the accident occurred. The track inside the building or alongside which the plaintiff fell was owned and maintained by the industry. The defendant's sole duty to plaintiff was to exercise reasonable care to furnish him with a reasonably safe place to work. It was not an insurer of plaintiff's safety. The mere fact, therefore, that plaintiff sustained an injury does not render defendant liable."

and again (at page 4):

> "*Before defendant can be charged with negligence in failing to remedy the condition which caused plaintiff's injury, or failed to warn plaintiff of the existence of such a condition, it is necessary to establish that the defendant had actual knowledge of the condition, or, in the exercise of ordinary care, should have known of its existence.* The record in this case clearly establishes that such circumstances did not

exist here. The only inference that can reasonably be drawn from this record is that the condition which caused the accident had been created within a short time before plaintiff's injury. *It may have been a matter of minutes or of hours, hence defendant cannot on this record be charged with constructive knowledge of the condition.*" (Emphasis added.)

Likewise in the *Friezell* case, plaintiff, a section foreman, brought an action against his railroad employer for injuries sustained while moving a push car from his employer's tracks. A directed verdict and judgment in defendant's favor were affirmed on appeal. The court stated (at page 157):

> "Plaintiff's second assignment of negligence, that defendant was negligent in furnishing him an unsafe place in which to work because the footing was insecure, causing him to slip in the act of assisting in placing the push car back on the rails, must assume as a predicate and premise that it was the duty of defendant, in the exercise of reasonable care, to keep the cinder ballasting on each side of the tracks and adjacent to the ends of the ties, smooth and even at all times and places, including the period of time when the ties were being removed and replaced. The test of negligence, as so well established and heretofore referred to at some length, is whether a reasonably prudent person, under the circumstances, would have done so. Applying the legal principle to the facts in this case—can it be said that defendant should have anticipated the necessity for plaintiff to be lifting a push car back on the rails at any and all points along its line, in view of the facts heretofore noted, and particularly the fact that this was not the main line and only one or two trains passed over it during the working hours? Can it be logically said that a reasonably careful and prudent person would assume that the normal indentations in cinder ballasting caused

by normal rainfall would furnish a hazard to section hands accustomed, as they had to be, to walking along and over such ballasting? The rule of law is well established that the standard of care must be commensurate to the dangers of the business.

"* * * The rule, of course, works both ways. Less diligence will be required to constitute reasonable care where the danger is slight than would be required where the danger is great. We fail to find any reasonable grounds for the inference that the defendant was negligent merely because slight unevenness in the surface of the cinder ballasting was permitted to exist at such places as the location of plaintiff's injury.

"We find no error in the conclusion of the trial court upon which the judgment was based. The judgment should be and is affirmed."

None of the cases cited in Appellant's Brief (pages 32 to 38) in any way negative this proposition. Even the case most heavily relied upon by plaintiff, *Williams* v. *Atlantic Coast Line R. Co.*, 190 F. (2d) 744 (C. A. 5, 1951), does not hold to the contrary. In that case an employee was ordered by his railroad employer to go to the scene of a washout along the railroad's tracks to make emergency repairs, in the course of doing which it was necessary for him to wade in deep water, as a result of which he drowned. While the Court said: "* * * the employer must make proper tests and inspections to discover dangers in the place where the employees must work, and after ascertaining their existence must take reasonable precautions for the safety of the employees," this language must be read in the context of the fact situation presented in that case. It is apparent that the employee was asked to engage in work at a location where the danger was obvious, and thus the employer could be said to have been put on notice by the mere existence of the obviously hazardous condition.

On the other hand, where the condition is not obvious to the employer prior to the time the employee commences work, it becomes a jury question as to whether the employer used reasonable care to detect the condition prior to the injury. In this connection, such factors as the length of time the condition had existed, the location of the condition, the fact that employees did or did not regularly work at that location, the opportunity available to the employer to discover condition, and many other factors are to be taken into account. This was the situation in the *Kaminski* and *Frizzell* cases as well as the instant case. The Court properly so instructed the jury.

The second respect in which Appellant's contention is erroneous is that it implies that the failure of the employer to make an antecedent inspection constitutes negligence *per se*, and not merely evidence from which the jury may conclude that the defendant failed to use reasonable care. No case cited by Appellant, nor any other case found by Appellee, so holds. If, as Appellee submits, the failure of the employer to use reasonable care to provide the employee with a safe place to work is the test upon which the jury is to predicate liability, an instruction by the Court that the employer's duty of antecedent inspection is absolute and his failure to do so is negligence would remove that issue from the jury's determination by making it negligence as a matter of law. Appellee submits that there is no authority in support of such a proposition and that such an instruction would have been improper.

For the above reasons, as well as those stated in the Opinion and Order of the Court (399a-402a) Appellee submits that the Court did not err in charging the jury that in considering whether the defendant used reasonable care to remedy an allegedly unsafe condition, the jury should consider the fact that only an hour elapsed between the time work started at the location and the time of the accident.

IV. It was not error to instruct the jury that if they found that the injury resulted from an accidental slip on one of a few pebbles, neither the plaintiff nor the defendant could be said to be negligent, where the pleadings and the arguments of counsel raised, and the testimony supported, that possible defense.

Appellant in her brief (pages 39-40) contends that the Court erred in charging the jury that they might consider the possibility that plaintiff's injury was the result of an accidental slip for which neither the plaintiff nor the defendant was responsible. Plaintiff asserts (page 39):

> "People do not fall for no reason at all. They either fall because of negligence of another, negligence of their own, the combined negligence of both, or a physical or a mental disability. Only where there is an act of God can it be said to have been an nonculpable accident to which the law attributes no fault to any one."

Appellee submits that this argument is clearly fallacious.

From the evidence adduced at the trial it became apparent that no one other than plaintiff witnessed her fall or knew how it occurred. Plaintiff admitted that at a hearing held two months after the accident she was asked what caused her to fall and she stated "I don't know." She was likewise asked at the hearing whether the condition of the crossing at the point where she fell was smooth or was irregular and her answer was "I don't know" (62a-68a). Plaintiff testified at the trial, however, that her feet rolled out from under her and her heel pushed through pebbles on the surface of the road leaving a mark (24a-5a), and that there were hundreds of pebbles all over the surface (25a). Defendant's foreman, Di Luzio, testified, on the other hand, that when he examined the scene immediately after the accident there was a heel mark five

or six inches long, twenty or thirty pebbles in the general area of the accident, and only one, two or three pebbles in the immediate vicinity of the mark (221a-2a).

It was defendant's theory of the case that plaintiff's injury was not caused by any negligence on defendant's part, but was caused either by the negligence of plaintiff herself, or by an unavoidable accident for which neither party could be held responsible. That defense was set forth in its Answer to plaintiff's Complaint by its denial of the allocation of negligence set forth in paragraph 6 of plaintiff's Complaint; in the opening argument of defendant's counsel wherein he stated:

> "We will show you that *if it was anybody's fault* it was Mrs. Burch's fault. * * *" (Appellee's Appendix 1b) (Emphasis added);

and in the closing argument of defendant's counsel, wherein he stated:

> "* * * The real issue you will have to decide in this case is whether or not the company was negligent in any way or *whether or not this was just an accident which was nobody's fault,* or whether it was an accident which was Mrs. Burch's own fault * * *" (316a). (Emphasis added.)

And further:

> "Nobody really has decided here, at least there is no evidence which would indicate one way or the other, whether, in fact, Mrs. Burch slipped on pebbles or whether she, just like any other heavy person might do, turned her ankle and fell and broke it. It happens all the time, as you all know. We think that there is no evidence one way or the other as to what caused Mrs. Burch to fall, and that the thing that she testified to back two months after the accident was correct, that she didn't know what made her fall, and

the chances are that she turned her ankle and fell" (313a).

Appellee submits that the evidence that Mrs. Burch was a short and very heavy person (180-185 pounds), that immediately after the accident she did not know what caused her to fall, and that examination of the scene immediately after the accident disclosed no appreciable number of pebbles in vicinity of her fall, gave rise to ample evidence in support of defendant's theory that she either slipped on one or two pebbles, for which defendant could not reasonably be held responsible, or that she merely turned her ankle and fell, which would be considered an unavoidable accident.

Where the evidence gives rise to a possibility that plaintiff's injury is the result of an unavoidable accident, the Court may properly charge the jury to consider such a possibility: *El Paso Electric Company* v. *Surrency*, 169 F. (2d) 444, 447 (C. A. 10, 1948), in which the Court stated as follows:

> "It may be that defendant's employee deliberately attempted to pass this truck by going into the southbound lane of traffic and thus drove directly into the path of plaintiff's on-coming car. On the other hand, their pick-up might have been forced across the road by a violent blow-out and under such conditions as made it impossible for them to control it. There is no direct evidence to this effect and the question of whether under all the evidence the accident was unavoidable or was due to the negligence of the defendant and its agents was properly submitted to the jury."

Likewise, in *Weschler* v. *Buffalo & Lake Erie Traction Co.*, 293 Pa. 472, 143 Atl. 119 (1928), the Supreme Court, in granting a new trial, held that it was error for the Court below to charge the jury that it was the duty

of the motorman "to have his car under such control that he could stop and avoid an accident." The Court stated that such a charge placed too great a burden on the carrier and imposed upon it the liability of an insurer; that no accident could happen under such instruction that would not carry with it an obligation to pay damages; and that "an accident may be one for which neither party was responsible."

In *Springfield Township* v. *Indemnity Insurance Co.*, 361 Pa. 461, 64 A. (2d) 761 (1949), the Pennsylvania Supreme Court was asked to hold that an insurance policy protecting the insured against "property damage accidentally suffered" required the insurance company to defend trespass actions which alleged negligence. The Court, in rejecting this contention, stated (at page 463):

> "With this contention we cannot agree. It assumes, erroneously, that the terms 'negligence' and 'accident' are synonymous. Such, however, is not the case. 'If accident and negligence be not opposites, we cannot regard them as identical, without confounding cause and effect. Accident, and its synonyms casualty and misfortune, may proceed or result from negligence, or other cause known, or unknown': *McCarty* v. *N. Y. & Erie Ry.*, 30 Pa. 247, 251. As stated in *Lacey* v. *Washburn & Williams Co.*, 309 Pa. 574, 578, 164 A. 724, 'That which distinguishes an accident from other events is the element of being unforeseen; an accident is an occurrence which proceeds from an unknown cause, or which is an unusual effect of a known cause, and hence unexpected and unforeseen.' See also *North American Life and Accident Ins. Co.* v. *Burroughs*, 69 Pa. 43, 51."

The cases cited by Appellant in her brief relate to situations where from the evidence adduced at the trial there was no possibility that the plaintiff's injury could have resulted from an unavoidable accident; such cases

are therefore not applicable to the situation presented in the instant case.

Appellee therefore submits that for the above reasons, as well as those set forth in the Opinion and Order of the Court (402a-3a) it was not error for the Court to charge the jury concerning the right to consider the possibility of unavoidable accident.

V. It was not error for the Court to use the words "doubt" and "convince" in the course of charging that plaintiff had the burden of proving defendant's negligence by a preponderance of the evidence.

The Court charged the jury as follows (329a):

> "The plaintiff has the burden of proving to you by the weight or the fair preponderance of the evidence that the defendant or its employees, other than the plaintiff, did not provide her with a reasonably safe place to work and that this negligence caused, in whole or in part, this injury to plaintiff. If, after considering all the evidence, the question of whether or not the defendant or its employees, other than the plaintiff, of course, were negligent in failing to use reasonable care to provide plaintiff with a safe place to work is so evenly balanced in your mind that you have no conviction, then you must find for the defendant. It is her burden to convince you that there was this negligence. Also, if the question of whether or not such negligence was a factor in causing the injury is so evenly balanced in your mind that you have no conviction, then you must find for the defendant."

And further (333a):

> "Now, this is one of the big points for you, this question of whether the plaintiff has proved to you by a preponderance of the evidence that there was a

failure to use reasonable care under all these circumstances. There she was with her galoshes, her overalls, her work jacket. The evidence must do more than raise a doubt in your mind on these points, if plaintiff is to sustain the burden. If there is just a doubt in your mind, you must bring in a verdict for the defendant, and that ends your consideration of the case. You don't need to go any further. On the other hand, if you are convinced by the preponderance of the evidence that the defendant or its employees, other than the plaintiff, were negligent, and that this negligence was a factor in causing the injury, then you must find for the plaintiff."

Appellant has extracted certain portions of those charges, has emphasized the words "doubt" and "conviction" and argues in her Brief (pp. 42-45) that by the use of those words "* * * the Court told the jury that the plaintiff must prove her case by evidence which leaves it with a 'conviction' free of 'doubt' which to the average individual means absolute proof positive or proof greater than 'beyond a reasonable doubt.'"

Appellee submits that a fair-minded reading of the above quoted portions of the charge gives rise to no such interpretation. Nothing in the charge contained any reference to the plaintiff's being obliged to prove her case "beyond a reasonable doubt". The Court repeatedly used the phrase "by a preponderance of the evidence," not merely in other portions of the charge but in the specific portions in which the words "doubt" and "convince" were used.

Appellee submits that the effect of the Court's charge was to instruct the jury that there must be more than a scintilla of evidence raising a question in the juror's mind as to whether the defendant might have been negligent, before it could bring in a verdict for plaintiff upon the issue of negligence. As indicated by the Court in its

Opinion and Order (395a-397a), the use of the words is consistent with the language of the United States Supreme Court in *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U. S. 104 (1941) at page 112, where the Court stated:

> "Wherever the burden rests, he who undertakes to carry it must do more than create a doubt which the trier of fact is unable to resolve."

Appellee therefore submits that for the above reasons there is no validity to plaintiff's contention that the use of the words "doubt" and "convince" in the context employed by the Judge's charge, constituted error.

VI. The plaintiff received a fair trial.

Appellant in her Brief (45-53) sets forth 25 respects in which she contends that the Court's charge was unduly favorable toward defendant and unfavorable toward plaintiff. For convenience, those 25 items will be analyzed hereafter *seriatim*.

> (1) *Contention:* "That the jury should consider the fact that the plaintiff had been doing this same kind of work ever since she had been working for the defendant as indicative that this was a safe place to work; clearly error *Margevich* v. *Chicago & N. W. Ry. Co.*, 110 N. E. 2d 914 (Ill. 1951), cert. den. 348 U. S. 861, 75 S. Ct. 84 (1954); that the plaintiff had been working on ballast where the stones are larger than the pebbles here involved and, therefore, the jury could find that the place was safe. These arguments encouraged assumption of risk as a defense. The court ignored the fact that the ballast was tamped down tight by a machine whereas the pebbles were loose and would more easily cause one to roll and fall than ballast."

Answer: The Court did not so charge. The Court stated (330-331a):

> "You also may consider the fact that plaintiff, as a worker on the tracks, was used to walking on ballast between and around the tracks. You remember what ballast is, those stones between the tracks in the pictures you see there. You can consider that she was hired to walk on stones of that sort and had done so for a number of years."

The above quoted language was incorporated in the portion of the charge relating to the issue as to whether defendant used reasonable care to provide plaintiff with a safe place to work. Appellee submits that the character of the terrain on which plaintiff was accustomed to work was a factor which the jury could and should properly take into consideration in determining whether defendant should have taken steps to remove pebbles from a street on which plaintiff was walking.

The statement in Appellant's brief that the ballast was tamped down tight by a machine is unsupported by any testimony. On the contrary, plaintiff testified (47a) that the ballast consists of large stones dumped in loose form between the ties.

> (2) *Contention:* "Assuming that the place was unsafe, inasmuch as the plaintiff had only been working at the place for an hour, the jury should take that fact into consideration in determining whether the defendant was negligent."

Answer: The correctness of the instruction in this respect has been fully discussed above under part III of this Argument.

> (3) *Contention:* "That a witness for the defendant said that the accident happened on the level ignoring the fact that the plaintiff said that it happened on a slope."

Answer: The statement is not correct. The Court charged the jury as follows (331a):

> "Now she says there were lots of pebbles, hundreds of pebbles, all over the road at this location and *that it was a steep place.*" (Emphasis added.)

It should be noted that plaintiff herself was not specific. In her testimony (20-21a) she stated that Scott's Lane was generally on a steep hill but the photographs indicated that the place where the tracks crossed the road was level and plaintiff herself did not testify that at the point where she fell it was a steep hill. Thus the Court was more generous to plaintiff in its charge than the testimony required.

(4) *Contention:* "That a witness from the Whitaker Company said that the road was in good condition, at the same time arguing that the city highway inspector and [*sic*] admitted that he did not know the condition of the road, whereas in fact that he had testified he was fully familiar with it, had studied it in order to recommend that the road be repaired, and that the road had been in bad condition for at least six months before the date of the accident."

Answer: This is an incorrect characterization of the charge of the Court, the pertinent portion of which is set forth at pages 331a-333a, which in turn is an accurate representation of the testimony of plaintiff's witness Osborne (121a-138a) and defendant's witness Chiolan (231a-241a and 247a-251a). Appellee submits that the Opinion and Order of the Court (406a-408a) completely rebuts this contention of the plaintiff.

(5) *Contention:* "That the jury should remember plaintiff was hired to walk on ballast and hence should not complain about pebbles. Untrue, and if true, was only an assumption of risk argument."

Answer: This is an inaccurate statement of the charge which is correctly quoted in Appellee's answer to Appellant's contention No. 1, *supra.* It should also be pointed out that the portion of the charge bore no relation to any doctrine of assumption of risk, but only related the issue of whether defendant used reasonable care to provide a safe place for plaintiff to work on a city street where there were allegedly pebbles, where plaintiff was an employee accustomed to working upon large loose ballast.

(6) *Contention:* "That in deciding whether or not the place was dangerous, the jury should consider the fact that the plaintiff was not carrying dynamite though there was no evidence of any dynamite in the case. This suggested that only a frightfully dangerous condition could be considered an unsafe place. There was no evidence of dynamite in the case."

Answer: This is an inaccurate characterization of the charge.

The charge was as follows (330a):

"You must decide whether this condition existed long enough so that the defendant, under all the circumstances, could be said to have failed to have used reasonable care in not removing the pebbles by sweeping or otherwise. If a railroad employee is engaged in carrying dynamite, clearly the degree of care imposed on the railroad to give him or her a smooth passageway is higher than when he or she is carrying a light load of dirt. You will remember the uncontradicted testimony of the foreman that he told her to do light work and that she was carrying light loads. At least, that is my memory, and if my memory does not agree with yours, again, that is for you to determine."

At the request for counsel for plaintiff, and in order to avoid any possible misunderstanding, the Court further charged the jury (354a):

> "When I was referring to dynamite, of course, that was purely an example. It had nothing whatsoever to do with this case. I was just trying to illustrate the principle that the greater the danger of a particular work, the greater the burden is on the railroad. It varies according to the circumstances, of course. You can understand that, and I was just using that as an illustration. It has nothing whatsoever to do with this case."

Appellee submits that, taken separately or together, the two above quoted portions of the charge contain no inference such as that stated in Appellant's Contention No. 6. See also Opinion and Order (401a-2a).

> (7) *Contention:* "The Court suggested that this accident could have been purely an accidental slip for which there would be no fault whereas no one had pleaded or made that argument and there was no evidence to support it."

Answer: The statement is without foundation. The defense of unavoidable accident was sufficiently pleaded in paragraph 6 of defendant's Answer. There is no requirement in the rules that nonliability by reason of pure accident must be pleaded affirmatively: See Federal Rules of Civil Procedure, Rule 8(b) and (c). The defense was asserted in the opening and closing arguments of counsel for defendant and was supported by testimony. This contention is answered fully *supra* in part IV of this Argument.

> (8) *Contention:* "In determining whether the place was a safe place to work the Court said that "all" that the defendant had to do (re: reasonable place to work) thereby suggesting that the duty to

provide a safe place to work was a very minimal thing indeed."

Answer: The charge was as follows (333a):

"The railroad may not defend on the ground that the plaintiff assumed the risk of working at this location which it prescribed. On the other hand, the railroad is not the insurer of the safety of all its employees. It does not guarantee their safety. All it is required to do under all the circumstances is to provide a reasonably safe place for its employees to work."

It is apparent from a reading of this portion of the charge that the Learned Trial Judge was merely distinguishing the duty to provide a reasonably safe place to work from the duty to absolutely insure the safety of defendant's employees. Appellee submits that the above quoted paragraph was neither intended to, nor had the affect of, minimizing defendant's duty of care.

(9) *Contention:* "The comment by the Court in reference to no sympathy for widows and orphans of stockholders of the railroad company who need the dividends to support themselves created unknown parties opposed for plaintiff to combat thereby creating mythical parties to the case whose interests were to be considered by the jury."

Answer: This contention has been fully discussed *supra* under Part II of this Argument.

(10) *Contention:* "The Court repeated that the burden of proof was on the plaintiff many, many times and used such words as 'conviction', 'convince' and that 'there must be no doubt' and repeatedly stated these things in such manner as to almost frighten the jury away from finding that the plaintiff had met the burden of proof."

Answer: The use of the words "conviction" and "convince" has been fully discussed *supra* under Part V of this Argument. Nowhere in the Court's charge as to burden of proof is found the phrase "there must be no doubt." The fact that the plaintiff's burden of proof was reiterated by the Court in its charge is not error, as was pointed out in *Palmer* v. *Miller,* 145 F. (2d) 926 (C. A. 8, 1944) in which it was contended that it was error for a trial judge to reiterate that the burden of proof was upon the plaintiff. The Court stated (at page 931):

> "* * * the burden of proof was upon the plaintiff, and we know of no Federal rule which limits the number of times that that truth, or any other truth, may be restated by a Federal Judge in a charge which on the whole is accurate and fair."

See also the Opinion and Order of the Court (409a).

(11) *Contention:* "Counsel for plaintiff argued that the failure of the defendant to call its employees created an inference that they would have been unfavorable to the defendant if called. The Court charged that the plaintiff could have called them as well. This was a statement contrary to existing law. *Chesapeake & O. Ry. Co.* v. *Richardson,* 116 F. 2d 860 (C. C. A. 6, 1941); *United States* v. *Di Re,* 332 U. S. 581, 68 S. Ct. 222 (1948); and *Haas* v. *Kasnot,* 371 Pa. 580, 92 A. 2d 171 (1952)."

Answer: The employee witnesses of defendant who were present in the Courtroom were brought there by Counsel for defendant at the request of Counsel for plaintiff to avoid the necessity for their being subpoenaed by him. There was no evidence that they knew of any facts relating to how the plaintiff fell, since plaintiff admitted that they were on the other side of the road and did not see her fall. There was no evidence that their testimony would have been favorable to defendant or

unfavorable to plaintiff. They were equally available to counsel for plaintiff, who knew of their presence in the Courtroom (14a-15a) and took advantage of their presence by calling upon them to rise and calling attention to their presence in the minds of the jury. Appellee submits that under the circumstances the argument of counsel for plaintiff was improper and the charge of the Court was proper. See also Opinion and Order (403a-406a), and discussion under (22) *infra.*

(12) *Contention:* "The Court gave sanction to the inference that the officials of the City of Philadelphia had wilfully conspired to build a new highway for the benefit of Whitaker Company, one of the property owners along the street to serve its purposes and advantages only, inferring misconduct by the City Council and the Highway Department which is supposed to build highways for the benefit of the entire public and to repair them only when needed and not merely as an accommodation for a single property owner in the area."

Answer: This contention is merely a summary of the argument made by counsel for Appellant to the jury (317a) concerning the testimony of Mr. Chiolan that the street was widened as a result, at least in part, of the request of the Fred Whitaker Company in order to accommodate its large trucks. The charge of the Court (331a-333a) took no position on this point. Appellant's contention here is really that the Court failed to adopt and reiterate the argument of Counsel for the Appellant to the jury.

(13) *Contention:* "The Court analyzed a statement taken by the defendant of the plaintiff in such light that it completely destroyed her explanation of it. In her statement she had said that she did not think she had slipped or tripped. In Court she said that she thought she rather rolled. The Court did

not mention the fact that the foreman himself admitted that there were pebbles and that he did see the skidmark of her shoe on the road supporting her contention that she had rolled on these pebbles."

Answer: The charge (331a) contained a correct characterization of the testimony relating to plaintiff's statement given after the accident (66a-9a and 6b). The Court charged, not once but twice (331a and 340a) that the foreman admitted that there were pebbles.

(14) *Contention:* "When counsel for the defendant told the jury that the railroad owed no duty to provide a reasonably safe place to work where the plaintiff fell because it was on a city street, to which she had been taken to perform her duties, counsel for plaintiff objected, the Court told the jury that the fact that it was on a public street did not *'necessarily'* excuse the defendant suggesting that it might. This was error. *Terminal R. Ass'n. of St. Louis* v. *Fitzjohn,* 165 F. 2d 473 (C. C. A. 8, 1948)."

Answer: Counsel for defendant made no such statement. (See 399a, footnote 53.) Nor did the Court instruct the jury as stated in this contention (see 10a). Appellant submits that the Court's instruction was proper and consistent with the established law, namely, that the location of the accident is a factor to be considered in determining whether the defendant has used reasonable care to provide plaintiff with a safe place to work. This principle is discussed fully *supra* under Part III of this Argument.

(15) *Contention:* "The Court refused to charge plaintiff's point number 3 which was a quote right out of *Terminal R. Ass'n. of St. Louis* v. *Howell,* 165 F. 2d 135, 138 (C. C. A. 8, 1948), which in turn took it from *Blair* v. *Baltimore & O. R. Co.,* 323 U. S. 600, 65 S. Ct. 545 (1945), which went right to the heart of the question of whether this was a reasonably safe place to work (361a)."

Answer: As is pointed out in the Opinion and Order (391a-2a) counsel for plaintiff submitted to the Court 26 long and complex points for charge (361a-370a) fifteen minutes prior to the time when the Court was to charge the jury. In view of counsel for plaintiff's non-compliance with Rule 51 of the Federal Rules of Civil Procedure, the Court's refusal to read all of plaintiff's points for charge would not have been reversible error: *Paul* v. *Duluth, Missabe and Iron Range Ry. Co.*, 96 F. Supp. 578, 580 (D. Minn., 1950). In any event, however, the railroad's duty of care under the circumstances was adequately covered by the charge and therefore there was no error in failing to read any particular requests: *Dubrock* v. *Interstate Motor Freight System*, 143 F. (2d) 304, 306 (C. A. 3, 1944), cert. den. 323 U. S. 765 (1944).

(16) *Contention:* "The Court refused to charge plaintiff's point number 5 (362a) which is a restatement of the case of *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350, 63 S. Ct. 1062 (1943), and went to the core of this case and corrected the improper statement by the Court in point (14) just above."

Answer: Plaintiff's point number 5 should not have been charged, since it was not applicable to the facts of the instant case. No attempt was made to argue that the railroad's responsibility had been delegated to some other person; the issue was whether the defendant had used reasonable care in providing plaintiff with a safe place to work where she fell on a city street. The Court charged plaintiff's point number 6 (338a) which was applicable.

(17) *Contention:* "The plaintiff submitted points number 9, 10, 11 and 12 (363a-364a) which were absolutely accurate under the law. The Court refused to charge those, and did not cover their subject matter in his charge. They sought to overcome the prejudicial and erroneous charge of the Court as to the duty of the defendant in the premises."

Answer: Plaintiff's point numbers 9, 10 and 12 were adequately covered in the charge. Plaintiff's point number 11 was an incorrect statement of the law, since it stated, in effect, that the existence of an unsafe place to work constitutes negligence *per se*. See discussion *supra* under Part III of this Argument.

(18) *Contention:* "Plaintiff submitted point number 20 on proper inferences to be drawn by the jury in the absence of exact proof of how the accident happened, in full reliance on *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1946). The Court refused to do so in this case where plaintiff's proof relied almost exclusively on inferences. Coupled with the severe charge as to plaintiff's burden of proof here, the failure to read this point was fatal (367a)."

Answer: Plaintiff's point number 20 went beyond the subject of inferences and was designed to exclude the possibility that plaintiff's injury was the result of unavoidable accident, a possibility supported by the evidence. See discussion *supra* under Part IV of this Argument.

(19) *Contention:* "Having in the body of its charge repeatedly discussed the burden of proof, the Court nonetheless read all of the defendant's points on burden of proof all over again and then read defendant's point number 3 which we believe is clearly erroneous which reads:

'• • • Thus, even if you find that the place where the *plaintiff fell is an unsafe place to work*, that fact by itself would not entitle the plaintiff to recover against the defendant in this case. • • • Before the plaintiff can recover from the defendant, *you must further find the defendant failed to use reasonable care.*'

The two phrases are incompatible and destroy each other."

Answer: This portion of the charge is not only supported by *Anderson* v. *E. J. and E. Ry. Co.*, 227 F. (2d) 91 (C. A. 7, 1955), as admitted in Appellant's Brief (page 51) but also by the authorities discussed more fully *supra* under Part III of this argument.

(20) *Contention:* "The Court stated as a positive fact that the plaintiff intentionally failed to put her weight on her foot thereby producing her continued disability despite the fact that the hospital records were replete with instructions to the plaintiff to wear appliances."

Answer: The testimony was uncontradicted to the effect that plaintiff intentionally failed to put her weight on her foot. See the testimony of plaintiff (32a), Doctor Farrell (88a), Doctor Bonner (97a), Doctor Albert (260a) and Doctor Jones (275a).

(21) *Contention:* "The misstatement that Dr. Walcott at the hospital to which the plaintiff was first taken, had agreed with the defendant's doctors that an open reduction did not have to be done and that plaintiff was healed. To the contrary he insisted that it was a necessary operation and that absent such work the exact disability that did follow would follow."

Answer: The Court did not so charge (334a-5a). The Court's charge was consistent with the testimony, which established that while Doctor Wolcott had first wanted to perform an operation, because the X-ray reports to which he referred indicated that there were presence of an only partially healed fracture, defendant's doctors objected because their examinations and X-rays indicated that the fracture was well healed; thereafter Doctor Wolcott's superior at Women's Medical College Hospital, Doctor Vastine, discovered a typographical error in the report referred to by Doctor Wolcott and concluded that the

fracture was in fact well healed and the patient was able to return to work (188a-9a). Thereafter Doctor Wolcott took a new X-ray and reported that he could still see the fracture line and was of the opinion that it was not entirely healed but that he would not perform an open reduction (189a).

If there was any discrepancy between the Court's charge and the testimony, it is immaterial because the Court carefully charged the jury that its recollection of the facts were controlling (334a-5a). It has been repeatedly held that it is not reversible error for a trial judge, in his charge, to comment upon a particular item of testimony, even incorrectly, so long as the judge leaves the decision as to the weight and affect of the testimony to the jury: see *Graham* v. *United States,* 231 U. S. 474 (1913); *Lever Brothers Co.* v. *Atlas Assurance Co., Ltd., et al.,* 131 F. (2d) 770 (C. A. 7, 1942); *Zurich* v. *Wehr,* 163 F. (2d) 791 (C. A. 3, 1947).

(22) *Contention:* "Whereas the Court refused to charge that the failure of the defendant to call its employees should create an unfavorable inference against the defendant, the Court did charge that the jury could draw an unfavorable inference against the plaintiff from her failure to call Dr. Wolcott and Dr. Lochman, who were merely doctors at public institutions to which she had been fortuitously taken for care. The opposing inference is proper under the law. Here, these doctors were equally available to both. See *Cafasso* v. *Pennsylvania R. Co.,* 169 F. 2d 451 (C. C. A. 3, 1948)."

Answer: In a number of cases, *e.g., Haas* v. *Kasnot,* 371 Pa. 580, 92 A (2d) 171 (1952); *Chicago and Northwestern R. R.* v. *Kelley,* 84 F. (2d) 569 (C. A. 8, 1936); *William Goldman Theatres Inc.* v. *Loew's Inc.,* 150 F. (2d) 738 (C. A. 3, 1945); and *Stoumen* v. *Commissioner of Internal Revenue,* 208 F. (2d) 903 (C. A. 3, 1953), it has

been held proper for a Court to permit an inference from the failure of a party to call a certain witness. It should be noted that in all of the above cases, the witness (*a*) had special knowledge of the circumstances surrounding the transaction in question, (*b*) had knowledge which the party who failed to call him contended would be favorable to that party's cause and (*c*) was absent from the trial. None of those conditions existed with respect to defendant's employees in the instant case (see Answer to Appellant's contention 11, *supra*); however, all of these conditions existed with respect to plaintiff's attending physicians. For that reason, an inference could properly have been drawn that plaintiff's failure to call those physicians was because their testimony would have been unfavorable to plaintiff. However, the Court did not so charge (335a):

> (23) *Contention:* "The charge that people who are injured are required to suffer pain in order to try to get themselves better created the impression that the plaintiff was malingering or at least refusing to suffer."

Answer: The Court did not so charge. The Court stated (337a):

> "* * * If you find the defendant negligent, you must give her something for pain and suffering because she did have very real pain, very real suffering, very real inconvenience during this period, and it is admitted by everybody that this business of putting weight on a broken ankle is painful, it hurts to get it well. On the other hand, a person has a duty to get it well, has a duty to try to cooperate and reduce the amount of damage."

Thus, the Court did not charge that a person owes a duty to suffer pain, but only that an injured person owes a duty to take reasonable steps to rehabilitate himself. Of course, the fact that the rehabilitation process may be

painful is a factor to be considered in determining the reasonableness of his conduct. This was made clear to the jury.

(24) *Contention:* "Repeatedly the Court charged over and over again that the mere fact that it was discussing damages should not lead the jury to believe that there should be an award for the plaintiff."

Answer: The statement was made twice, once in the body of the charge (333a) and once by reading defendant's point No. 10 (345a). As stated in *Palmer* v. *Miller,* 145 F. (2d) 926 (C. A. 8, 1944) at 931:

"* * * we know of no federal rule which limits the number of times that * * * any * * * truth, may be restated by a Federal Judge in a charge which on the hold is accurate and fair."

(25) *Contention:* "The Court told the jury that the plaintiff was guilty of contributory negligence as a matter of law in not putting her weight on her foot."

Answer: The Court did not so charge. The pertinent portion of the charge is quoted *supra* under Answer to Appellant's Contention 23.

CONCLUSION.

A reading of the record in this case will demonstrate, Appellee submits, that this was a case almost devoid of anything which might be considered evidence of liability on defendant's part. The contention that plaintiff was injured due to exhaustion by being made to do heavy work was totally unsupported by any evidence. Plaintiff was able to take her case to the jury only by an assertion (made five years after her accident and contradicted by

her statement made two months after the accident and by ample testimony of other witnesses) that she fell because of pebbles on a street where she was walking. That the jury would either disbelieve her or would find that her railroad employer had used reasonable care for her safety under the circumstances, was not unlikely.

The jury's verdict in defendant's favor was amply supported by the evidence. Plaintiff, quite understandably, would like a new trial by a different jury. Despite the vigorous (and often inaccurate) assertions in Appellant's brief, however, the fault lies not in the charge of the Court but in the weakness of plaintiff's case.

The charge of the Court presented the facts fairly and left the issues to the jury to determine. The portions of the charge, taken out of context or inaccurately characterized in Appellant's brief, do not even then disclose prejudicial error. The charge must, however, be read as a whole: *McLeod* v. *Union Barge Line Co.*, 95 F. Supp. 366, 369 (W. D. Pa., 1951) *aff'd* 189 F. (2d) 610 (C. A. 3, 1951). Appellee submits that a reading of the charge in its entirety, and in the light of the testimony, will clearly indicate that the charge was free of error and that, if anything, plaintiff's case was given better treatment than it deserved.

For the above reasons, as well as those set forth in the Opinion and Order of the Trial Court, and Exhibit A thereto, defendant suggests that there is no merit in Appellant's motion for a new trial, and asks that the judgment of the Court below denying that motion be affirmed.

Respectfully submitted,

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Of Counsel.

APPELLEE'S APPENDIX.

I. PORTION OF THE RECORD OF THE OPENING SPEECH OF COUNSEL FOR APPELLEE.

"So we say that we will show you that this accident did not happen through any fault of the Railroad Company, and, therefore, that the Railroad Company should not be held liable to Mrs. Burch. We will show you that if it was anybody's fault, it was Mrs. Burch's fault, and, therefore, that this is a case of what the law calls contributory negligence."

II. EXHIBIT A TO OPINION AND ORDER.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action. (Filed 3/19/56)
No. 13654.

Lucille H. Burch,
v.
Reading Company.

EXHIBIT A TO OPINION OF MARCH 16, 1956.

I. CONTENTION THAT CHARGE ERRONEOUSLY STATED THAT PLAINTIFF DID NOT PUT WEIGHT ON HER FOOT AND WAS UNREASONABLE IN NOT DOING SO (PARAGRAPH: 29, 33 & 34 OF MOTION FOR NEW TRIAL).

The record makes clear that from time to time during the time since plaintiff's fall on November 27, 1950, she used casts, braces, crutches, and restrictive bandages, thereby taking weight off her foot. At certain times her failure to place weight on her foot was recommended by doctors, but at other times this was contrary to the advice

of certain doctors (see testimony referred to at page 5 of the opinion). Plaintiff did not testify that she followed the doctors' advice in putting more and more weight on her foot, but that she tried it and could not do it because "it was hurting."[1] The charge did not say at any point that plaintiff did not have good cause to refuse to put weight on her foot or that she was unreasonable in not putting weight on her foot. This decision was left to the jury under language based on the Restatement of Torts, § 918(1) and Comment (e).[2] Cf. *Murphy* v. *American Barge Line Co.*, 169 F. 2d 61, 64 (3rd Cir. 1948); *Lewis* v. *Penna. R. R. Co.*, 100 F. Supp. 291, 294 (E. D. Pa. 1951); *Feathersmith* v. *United States*, 104 F. Supp. 226, 229-30 (E. D. Pa. 1952). Also, the charge did not state that a person has a duty to suffer pain.

II. Contention that it was erroneous to say that Dr. Wolcott agreed with the other doctors in believing there was no need for an open reduction operation (Paragraph 30 of Motion for New Trial).

A reading of Exhibit P-11[3] and consideration of the testimony on this point indicates to the trial judge that, after considering new X-rays, as well as X-rays taken at Jefferson Hospital, Dr. Wolcott did not want to perform

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[1] N. T. 62. At page 66, she said of the doctors: "They wasn't doing nothing." At page 73, she said that the doctors "didn't pay me no attention."

[2] See N. T. 497, 500-501 and 501-502, where this language was used:

"There would be no recovery for this if you believe the plaintiff was unreasonable in trying to rehabilitate her leg through using it and that she was able to work in July 1951. If she has cooperated in trying to get well but has not recovered, even though her doctors were not good doctors, that is not her fault, and then her recovery for this second item of damages would vary from $23,000 to $27,800, * * *.

* * * * * * *

"* * * you must give her something for pain and suffering, because she did have very real pain, very real suffering, very real inconvenience during this period, and it is admitted by everybody that this business of putting weight on a broken ankle is painful, it hurts to get it well. On the other hand, a person has a duty to get it well, has a duty to try to cooperate and reduce the amount of damage."

[3] See the last sentence of the first paragraph of this communication of August 22, 1951.

an open reduction operation as of 8/21/51, even though he believed the bone was not entirely healled. See N. T. 313-314.[4] Even if the trial judge was incorrect, the charge emphasized that the trial judge's memory on this point might be different from that of the jury and that the jury might remember some evidence that the judge had overlooked.[5] There is no evidence in the record that plaintiff was unable to produce Dr. Wolcott as a witness, so that any confusion in the record on this point, which was introduced into the case by plaintiff, is her responsibility. Under such circumstances the charge does not contain reversible error in this respect.

III. CONTENTION THAT IT WAS ERROR TO DRAW AN INFERENCE FROM THE FACT THAT PLAINTIFF FAILED TO CALL DR. WOLCOTT AND DR. LOCKMAN (PARAGRAPH 31 OF MOTION FOR NEW TRIAL).

On the issue of damages, one of defendant's main contentions was that plaintiff had been physically able to return to work on July 31, 1951. One of plaintiff's contentions was that Dr. Wolcott, of the Women's Medical College Hospital, had believed it was advisable to perform an open reduction operation on plaintiff in August

[4] The following testimony appears at N. T. 314:

"Q. Dr. Cherner, as a result of your department's conversation with Dr. Vastine of the Women's College Hospital, was it or was it not concluded that this woman was able to use her left ankle or foot without having any such operation?

A. It was."

[5] The language of the charge at N. T. 497-498 is as follows:

"* * * in July 1951, Dr. Wolcott felt that an open reduction operation would be desirable because the plaintiff complained of pain preventing her from working. In the letter of August 22, as a result of x-rays, and a typographical error in a previous report, he changed his position and stated that he would not perform an operation.

"Now, this is my memory of the testimony and yours may be different. Dr. Wolcott's position in wanting to do an open reduction was changed as a result of the stand taken by doctors employed by the Reading Company, but I can remember nothing in the record that indicates that his mind was not completely changed by the opinions of the doctors. However, counsel for plaintiff has argued to you that Dr. Wolcott was prevented from doing this operation by the Reading Company doctors, and you may remember some evidence on this which I have overlooked."

1951 and, hence plaintiff could not have been fit for the strenuous work of a track laborer on July 31, 1951. As pointed out above under part II of this Exhibit A, the plaintiff produced the testimony concerning Dr. Wolcott's views on such an operation from the defendant's medical records, but the testimony and Exhibit on this point do not make crystal clear what Dr. Wolcott's ultimate view concerning this operation was. Under these circumstances, Dr. Wolcott was very familiar with a relevant fact, that is the physical condition of plaintiff's left leg and ankle in the summer of 1951, and there was no showing that he was unavailable as a witness.

Another contention of defendant was that plaintiff's present condition resulted from disuse of her muscles caused by using tight bandages, crutches, a brace, etc., keeping her ankle from getting exercise. During the trial, plaintiff's counsel also brought out by having a witness testify from the medical records of the Philadelphia General Hospital that Dr. Lockman of that hospital had treated plaintiff in 1952 and recommended that she wear a brace. Hence, Dr. Lockman was familiar with plaintiff's physical condition in 1952 and there was no showing that he was unavailable as a witness.

The applicable rule of law in such cases is that where witnesses familiar with the facts are available and not produced on the stand, the jury is entitled to infer that their testimony would be unfavorable to the cause of the party whose interest it is to establish the facts with which the witnesses are familiar. See *United States* v. *Grannis,* 172 F. 2d 507 (4th Cir. 1949), cert. den. 337 U. S. 918 (1949); Wigmore on Evidence (3rd Ed.), § 285.

In view of the above facts, this language of the charge is no more favorable to the defendant than the trial judge was required to give under the above-mentioned rule of law (N. T. 498-499):

> "In this connection, you are entitled to take into consideration plaintiff's failure to produce as a wit-

ness Dr. Wolcott, to whom she referred so often during this case, and Dr. Wolcott was never here in court. Dr. Lockman was never here in court, and those were the doctors who treated this plaintiff during this early period when the Reading Company says that they gave her a return-to-work slip, that she was perfectly able to return to work, and their doctors say there was a complete union, and they say that she kept using Ace bandages and other supports which did not put the proper weight on the ankle in order to permit its recovery."

In view of the references to these doctors in the arguments of counsel (N. T. 442-444, 466-467, & 472-473), an instruction on this subject was necessary and proper.

IV. Contention that it was error to point out that Dr. Bonner never saw records of Women's Medical College Hospital (Paragraph 32 of Motion for New Trial).

Plaintiff's counsel called Dr. Bonner, who testified that he examined her on November 9, 1955, when he made the diagnosis described at page 6 of the Opinion. Also, Dr. Bonner testified that plaintiff was using a crutch and cane, during the period since her fall on 11/27/50, under doctor's orders, even though he had only seen the records of the Philadelphia General Hospital and the Temple University Hospital beginning in January 1952 and had not seen the records of the Women's Medical College Hospital (N. T. 186), where plaintiff was treated until the end of 1951 (N. T. 172 and 174-176). Furthermore, it was as of July 31, 1951, that defendant's doctors believed plaintiff had made a sufficient recovery to resume her job as a track laborer. Under these circumstances, the trial judge felt it was his duty to point out in the charge that Dr. Bonner saw none of the 1951 records when plaintiff was treated at the Women's Medical College Hospital (N. T. 499).

III. DEFENDANT'S EXHIBIT 1.

OFFICE OF SUPERVISOR
406 Spring Garden St. Sta.
Philadelphia, Pa.

January 19, 1951

Testimony of Lucille H. Burch, Section Laborer, at the hearing and investigation in the case of personal injury at Scotts Lane East Falls, on Monday, November 27, 1950, at about 8:15 A.M.

Following present:

J. A. Voelker, Supervisor.
Carl Bello, Vice Chairman.
Domenic DiLuzio, Section Foreman.
Lucille H. Burch, Section Laborer.
E. A. Frank, Claim Agent.

MR. VOELKER (questioning):

Q. Mrs. Burch, you have been called to the office to attend hearing and investigation under the rules of your agreement in connection with personal injury sustained by you at about 8:15 A.M. on Monday November 27, 1950, while working at Scotts Lane, East Falls, regarding which you are charged with responsibility. Is this understood by you?

A. Yes.

Q. You are charged with responsibility in connection with this injury. Are you ready to proceed?

A. Yes.

Q. Do you desire to be represented by counsel or have any other witnesses present?

A. Yes, Mr. Bello, who is present.

Q. What is your length of service?

A. Since, April 20, 1944.

Q. How long have you been a section laborer?

A. Since, April 20, 1944.

Q. What is your present assignment and how long have you held it?

A. Section laborer, Wissahickon, since April 14, 1950.

Q. Mrs. Burch, at 8:15 A.M., November 27, 1950, you were instructed to perform certain duties at Scotts Lane Crossing, on the Norristown Branch. Tell me just what you were doing at this time.

A. I was assigned by Section Foreman DiLuzio with section laborer Avellino to fill in crossing at Scotts Lane. We were taking dirt from the south side of the railroad and carrying it to the crossing filling in the holes on the east bound track. While returning to get another shovel of dirt I fell just outside of the east bound track on the paved portion of the street. When I fell I felt pain in my left leg. The other laborers helped me to my feet and stopped a passing motorist, who took me to Womens' Medical Hospital. At the hospital, they took X-rays and put a cast on my leg. About 1:00 P.M. they permitted me to go home.

Q. Mrs. Burch, what do you attribute the accident to your foot?

A. I fell.

Q. Mrs. Burch, what caused you to fall?

A. I don't know.

Q. Mrs. Burch, was the condition of the crossing at this point, were you fell, was it smooth or was it irregular?

A. I don't know.

Q. Mrs. Burch, about how far from the near rail and also how far from edge of paved portion of street did you fall?

A. About 2 steps, from near rail, and 2 steps from edge of paved portion of the street.

Q. Mrs. Burch, what type of shoes were you wearing.

A. I had on a pair of high shoes with a pair of galoshes over the shoes. The galoshes were closed with a zipper. Galoshes and shoes were in good condition.

Q. Mrs. Burch, did you slip or trip?

A. I don't know.

Q. Mrs. Burch, what were the weather conditions at this time?

A. Clear and cold.

Q. Mrs. Burch, was there any ice or snow on the ground?

A. No, but the ground was froze.

Q. Mrs. Burch, what was the condition of the surface of the street were you fell?

A. The street was dry and frozen. I was clear of ice and snow.

Q. Mrs. Burch, then you insist you do not know what caused you to fall?

A. Yes.

Q. Mrs. Burch, have you ever had any physical ailment at this or some prior time which might have contributed to your fall?

A. No.

Q. Mrs. Burch, will you please explain whether you leg just went out from under you, or whether it simply bent which caused you to fall.

A. I don't know how I fell but I fell on my left side with my left leg under me.

Q. Mrs. Burch, did the empty shovel which you said you were carrying in any way cause you to fall?

A. I don't think the shovel caused me to fall because I was carrying it in front of me with both hands.

Q. Mrs. Burch, do you recall whether the surface of the street were you fell was level.

A. It was on a descending grade.

Q. Mr. DiLuzio, you were repairing crossing at Scotts Lane on November 27, tell me what instructions you had given to the gang at this time?

A. My instructions to the gang were to level the flanging plank even with the top of rail on both tracks and I instructed Lucille Burch to fill in the holes in the crossing with dirt.

Q. Mr. DiLuzio, just where were the holes that you instructed Laborer Burch to fill?

A. The holes were between the rails of the eastbound track.

Q. Mr. DiLuzio, the planks had been replaced and it was voids which Laborer Burch was instructed to fill in. Is that correct?

A. Yes.

Q. Mr. DiLuzio, where were you when the accident occurred?

A. I left the gang at about 8:05 A.M. in charge of Laborer Commentucci and went to East Falls Station to call the office as we are instructed to do. I returned about 8:20 A.M. and found that Lucille Burch had been injured and had already been taken to the hospital by a passing motorist. I asked the other men the point where Mrs. Burch had injured herself. They indicated the spot where she had fallen, and marks indicated the spot where she had fallen. I measured it and found it to be 3 feet from the near rail of the eastbound track, and about 2½ feet from the edge of the paving, and on the paved portion of the street. The street is of macadam construction, it was smooth and dry, and free of loose stones and dirt.

Q. Mr. DiLuzio, what were the marks that you observed where she fell?

A. Dark marks, apparently made by her galoshes.

Q. Mr. DiLuzio, what was the weather conditions?

A. Clear and cold, the street was free of ice and snow.

Q. Mr. DiLuzio, did you question the men after your return as to the fact relating to the accident?

A. Yes, Laborers Avellino, Commentucci, and Abbonizio and Spranzone were all present when the accident happened.

Q. Mr. DiLuzio, did you inspect the shovel that Laborer Burch used and what was its condition?

A. Yes, the shovel was in good condition. I inspected the shovel shortly after the accident. It was a regular #2 square mouth track shovel.

Q. Mrs. Burch, are you acquainted with Rule 4, in the safety rules for the Guidance of Employees?

A. Yes.

Q. Mrs. Burch, will you please quote or read this rule?

A. Mrs. Burch read rule #4. "4. Employees must be on the lookout for their own safety and must not depend upon supervisors or other persons to warn them of approaching danger. At places where clear view cannot be obtained, extra precaution must be taken. In case of doubt, always pursue the safe course."

Q. Mrs. Burch, do you admit your responsibility, in having violated this rule.

A. I always work safely and our Foreman daily instucts us to work safely. I cannot say if I violated this rule or not because I do not know what caused me to fall.

Q. Mrs. Burch, were you looking where you were walking when you fell?

A. Yes.

Q. Mrs. Burch, the purpose of this investigation is to develop the cause which lead to the accident and it is your responsibility to be on the alert for your own safety. You have admitted that Section Foreman DiLuzio has instructed daily in safety practices. In this particular case if you had been more careful of your footing, in my opinion, you would have observed the conditions which contributed to your injury and if you had this accident would have been averted and you would have been spared the injury sustained. Safety methods must be practiced more today than ever before so that we can realize the goal set up for Reading Company employees. I trust that in the future you will be very careful to see that no accidents will occur to you or others working with you in the performance of duty. Is this understood by you.

A. I understand what you have said.

Q. Mrs. Burch, do I have your assurance that in the future you will work in a safe manner?

A. Yes.

Q. Have you anything further to say?

A. No.

Q. Mrs. Burch, has this hearing and investigation been conducted in a fair and impartial manner and in accordance with scheduled requirements?

A. Yes.

LUCILLE H. BURCH

FILED
MAY 2 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956 No. 886

LUCILLE H. BURCH,
Petitioner,

v.

READING COMPANY,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION

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PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA

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QUESTIONS PRESENTED.

I. In an action under the Federal Employers' Liability Act,[1] did the Court of Appeals err in affirming the action of the Trial Judge in directing the jury to disregard certain testimony of a plaintiff's witness and certain documents introduced by plaintiff in an attempt to establish that plaintiff was injured due to defendant's negligence in requiring plaintiff, a woman, to perform work too heavy for her, where neither the testimony nor the documents supported the contention, plaintiff herself testified that she was capable of performing heavy work, the testimony established that she was actually doing light work at the time of her accident, and there was no evidence that her fall was due to the type of work then being performed by her?

II. Did the Court of Appeals err in affirming the action of the Trial Judge in instructing the jury, *inter alia,* that, in considering whether defendant used reasonable care to provide plaintiff with a safe place to work, the jury should consider the length of time any allegedly unsafe condition had existed and whether defendant had sufficient notice of such condition?

III. Did the Court of Appeals err in affirming the action of the Trial Judge in instructing the jury, *inter alia,* that if they should find that the injury resulted from an accidental slip on one of a few pebbles, neither the plaintiff nor the defendant could be said to be negligent, where the pleadings and the arguments of counsel raised, and the testimony supported, the possible defense of unavoidable accident?

IV. Did the Court of Appeals err in affirming the action of the Trial Judge in using the words "doubt" and "convince" in the course of charging that plaintiff

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[1] 35 Stat. 65 as amended 36 Stat. 291, 53 Stat. 1404, 45 U. S. C. § 51 *et seq.*

had the burden of proving defendant's negligence by a preponderance of the evidence?

V. Where the closing argument of counsel for plaintiff contained statements, designed to arouse the sympathy of the jury and unsupported by any testimony, implying that plaintiff should receive a substantial verdict to assist in supporting two small foster children, did the Court of Appeals err in affirming the action of the Trial Judge in instructing that the jury "should no more be swayed by sympathy for the plaintiff than for the widows and orphans who may be receiving dividends or interest from the defendant company and who may need that income for themselves and their families" and that no sympathy of any sort for either side should play a part in the decision?

STATEMENT OF THE CASE.

Plaintiff brought an action under the Federal Employers' Liability Act for injuries allegedly sustained by her when she fell upon a street at Scotts Lane Crossing, Philadelphia, while she was working as a track laborer, on or about November 27, 1950. The testimony at the trial November 15-18, 1955, summarized briefly, was as follows:

Plaintiff testified that she went to work for Reading Company in 1944 as a section laborer; that with a gang of other laborers she went to Scotts Lane Crossing at 7 o'clock A. M. November 27, 1950, to make repairs by filling in holes under the rails of defendant's tracks; that she was 5 feet 4 inches tall and weighed 180 to 185 pounds (73a); that it was her job to dig dirt out of a pile alongside the crossing and carry it to the point on the crossing where the holes were located; and that while walking back from the rail to the pile of dirt, carrying an empty shovel, she fell, about 8:15 a.m. She testified

that she fell upon the paved surface of the City street about 3 feet south of the rail and about 2½ feet in from the edge of the street; that she was wearing galoshes, overalls, and a jacket; that when she fell she could feel her feet rolling out from under her and could feel pebbles about the size of her little fingernail (25a); and that the street was worn out and covered with hundreds of pebbles (25a).

Upon cross-examination, plaintiff admitted that she was hired to do the same work as male track laborers, lifting ties, working on rails, pulling spikes out of rails, and shovelling ballast, (46a-47a) and that she had been able to do that type of work continuously for six years prior to the accident (48a); that she was accustomed to working on ballast which was dumped loosely in between the ties along the track by a machine (47a); that at the crossing there were pebbles all the way from the rails to the bottom of the hill, a distance in excess of 100 feet (25a, 55a); that she saw the pebbles on the street before she fell (55a); and that she walked just as carefully as she could doing her work, but the accident happened (55a). Plaintiff further admitted that at a hearing in January 1951 held by defendant two months after the accident, she had testified that she did not know what caused her to fall, she did not know the condition of the street and she did not mention the existence of any pebbles (63a-71a).

Joseph E. Osborne, Field Supervisor of the Department of Streets of the City of Philadelphia, testified that he went to Scotts Lane Crossing to supervise the repaving of it in April 1951, five months after the accident (123a), and that at the time the street was full of holes, depressions and cracks, and there was a steep grade (123a-129a).

Upon cross-examination, Osborne admitted that he could not testify of his own knowledge as to the condition of Scotts Lane in November of 1950, or whether it was

the same as in April 1951 (129a), or whether there was any hole within 3 or 4 feet of where plaintiff fell (131a), because he only drove over it once or twice a month; and that Scotts Lane was repaved in 1951 as the result of a City ordinance approved May 24, 1950, six months prior to plaintiff's fall (131a).

In an effort to show that the plaintiff, at the time of her accident, was performing work which she should not have been required to do and which was imposed upon her by her immediate supervisors without the approval of the management of defendant (40a-42a), counsel for plaintiff called R. W. Morrison, Track Supervisor of Reading Company, and confronted him with a memorandum dated April 20, 1949, relating to a certain train trip to be made by defendant's Board of Directors on April 26, 1949 (1½ years prior to the accident) which contained, *inter alia*, the following sentence: "* * * also make general clean-up of papers, rubbish, and so forth, on your section, and keep your women laborers out of sight when this train passes." Mr. Morrison testified, contrary to the contention of plaintiff's counsel, that the above-described sentence was placed in the memorandum because he did not wish to be criticized by the Board of Directors who were riding upon that train, if they were to see women laborers doing light work, such as picking up papers, rather than the usual heavy work for which track laborers are customarily assigned (153a-154a); and that the Board of Directors knew that the railroad had in its employ women hired to do regular track labor (155a).

Plaintiff produced no testimony to show that the memorandum in question was written for the purpose of concealing from the Board of Directors the fact that women laborers were working at regular track labor, nor did plaintiff produce any testimony to show that the order contained in the memorandum bore any relation to the work being done by plaintiff on the date of her accident or in any way contributed to her accident. Plaintiff's

foreman, DiLuzio, called in rebuttal by counsel for plaintiff, testified that he neither received the memorandum of April 20, 1949, nor had he discussed it with his supervisors (289a-290a). At the conclusion of the testimony, upon motion by counsel for defendant, the Trial Judge directed that the testimony of Mr. Morrison, the contents of the memorandum and all other testimony relating to the subject of that memorandum be stricken and disregarded by the jurors.

Defendant produced plaintiff's foreman, DiLuzio, who testified that he came to the scene five minutes after the accident; that the street at the point where plaintiff fell was smooth and in good condition; that he saw a dirty or ashen colored heel or shoe mark where plaintiff fell; that there were only 20 or 30 scattered pebbles in the general area where she fell and only 1, 2 or 3 pebbles at the shoe mark (221a-222a); and that she was doing light work (229a-230a).

Defendant likewise produced the testimony of Larry Chiolan, Plant Engineer of the Fred Whitaker Company, which was located adjacent to Scotts Lane Crossing. Mr. Chiolan testified that the contract for the repaving of Scotts Lane from Abbottsford Road to Ridge Avenue was let as a result of an ordinance which was introduced following negotiations between the Fred Whitaker Company and the City, because the Whitaker Company desired to have Scotts Lane widened in order to permit its large tractor-trailer trucks to enter the plant from Abbottsford Road; that he, himself, passed the crossing going to and from work at least twice every day during November of 1950 and that the condition of the road was generally good (231a-237a).

After a full and complete charge by the Trial Judge (342a-357a) the jury returned a verdict in favor of defendant. Petitioner's motion for a new trial was denied in an opinion reported at 140 F. Supp. 136 (376a-412a). Upon appeal by petitioner from judgment entered by the

District Court, that judgment was affirmed by the United States Court of Appeals for the Third Circuit on January 8, 1957, and is reported at 240 F. (2d) 574. The Petition for certiorari followed.

ARGUMENT.

The instant case is not one in which certiorari should be granted for the following reasons:

1. The decision of the Court of Appeals is not in conflict with any of the decisions cited in the Petition but is, on the contrary, consonant with the principles enunciated in decisions of this and other Courts.

2. There is no reason to believe that the decision will, as alleged in the Petition, "generate a flood of additional litigation and appeals" either in cases under the Federal Employers' Liability Act or in general civil litigation.

3. The case turns upon a simple, if unusual, set of facts and does not call for the determination by this Court of any important principles of law.

4. The case was presented to a jury upon a full, complete and fair charge and resulted in a verdict for defendant, not because of any errors of law, but because of the inadequacy and unbelievability of plaintiff's testimony in support of her theory of liability.

POINT I.

The Court of Appeals correctly affirmed the action of the Trial Judge in withdrawing from the jury's consideration the testimony of plaintiff's witness Morrison and documents relating thereto, since they failed to create any inference that plaintiff's injury was the result of defendant's negligence in requiring her to do work too heavy for her.

Petitioner contends that the Trial Judge erroneously withdrew from the jury's consideration one of two issues,

namely, the issue of defendant's negligence in allegedly requiring plaintiff to do work too heavy for her. Examination of that evidence discloses, however, that it was of no probative value in supporting plaintiff's theory of liability.

In essence, the evidence consisted of a memorandum relating to a particular train trip in April of 1949 (1½ years prior to plaintiff's accident), wherein defendant's track supervisor, *inter alia,* directed that women laborers be kept out of sight when the train, carrying the company's Board of Directors, passed; and a notice of a hearing in February 1949 (also 1½ years prior to plaintiff's accident), indicating that a woman laborer (not plaintiff) had previously complained that the work was too hard for her.

Plaintiff's efforts to relate these documents to the work plaintiff was doing at the time of her accident failed completely, for the following reasons:

(1) The track supervisor testified that the employment of women as track laborers was known to the Board of Directors, and that they were hired at men's rate of pay with the understanding that they would do the same work as men (159a);

(2) Plaintiff herself testified that she was and had been capable of performing all of the duties of a track laborer (including lifting ties, pulling spikes out of rails and shovelling ballast) throughout the six years of her employment (46a-48a), and did not testify either that she was in any way fatigued by the work she was doing at the time of her accident or that she complained that the work was too difficult for her;

(3) Plaintiff's foreman testified that he never received or discussed with his supervisor the memorandum of April 1949 and no evidence was offered to show that its contents were applicable to the work being done by plaintiff at the time of her accident;

(4) Plaintiff's foreman testified that the work being performed by plaintiff on the day of her accident (carrying a shovel to put dirt in a hole) was light work as contrasted with regular track work;

(5) Plaintiff testified that at the time she fell she was walking on the street carrying an empty shovel.

While it has been the policy of the Courts to construe liberally the provisions of the Federal Employers' Liability Act and to permit issues of liability to be determined by a jury, where there is some evidence from which the jury might infer negligent conduct on behalf of a defendant railroad employer (as in the cases cited by the Petitioner), a plaintiff is not entitled to have an issue presented to the jury where there is no evidence, nor any inference which reasonably may be drawn from the evidence, in support of that issue: *Moore* v. *Chesapeake & O. R. Co.*, 340 U. S. 573, 95 L. ed. 547, 71, S. Ct. 428 (1951); *Eckenrode* v. *Pennsylvania R. Co.*, 335 U. S. 329, 93 L. ed. 41, 69 S. Ct. 91 (1948); *Brady* v. *Southern R. Co.*, 320 U. S. 476, 88 L. ed. 239, 64 S. Ct. 232 (1943).

It should also be noted that the cases cited in the Petition (page 13), relating to the theory of liability based upon failure to provide additional help to a railroad employee, are cases wherein there was testimony that the employee had complained to his employer of the difficulty of the work or the need for additional help and the employer had failed or refused to provide such help or to permit the employee to be relieved. Such cases are not applicable to the facts of the instant case, and no case cited by petitioner holds that an employee is entitled to recover upon that theory where there is no evidence that the employer had received notice, either from the employee or otherwise, that the employee was unable properly to perform his work.

The Trial Judge correctly withdrew the testimony from the jury's consideration, leaving open for its consideration the issue as to whether defendant had failed to use reasonable care to provide plaintiff with a reasonably safe place to work; the Court of Appeals correctly affirmed this action.

POINT II.

The Court of Appeals correctly affirmed the action of the Trial Judge in charging the jury that if an unsafe condition existed where plaintiff was working, the length of time that the condition had existed prior to the accident was to be considered in determining whether defendant had sufficient notice of the condition so that it could be considered negligent for failing to remedy the condition.

In its charge to the jury the Court read plaintiff's point for charge No. 8 as follows (339a-340a):

> "The duty of providing a reasonably safe place to work imposes upon the employer the affirmative duty of inspecting the place where its employees are to work and imposes a duty on the employer to search out defects or hazards which would normally be revealed thereby and the failure to make such reasonable inspection or to learn of the conditions which a reasonable inspection would reveal is negligence. If you find that the plaintiff in this case suffered her injuries, in whole or in part, because such an inspection was not made and therefore, not corrected, then your verdict must be for the plaintiff."

At another point in its charge (330a) the Court charged the jury as follows:

> "Even if you believe plaintiff's position that there were so many pebbles that an unsafe condition existed, you must consider, among other things, whether the defendant's foreman, Mr. DiLuzio, who

was the defendant's chief representative on the scene, should have had notice of this condition, in view of the fact that only an hour, approximately, elapsed between the time work started at this location and the time of the accident and the fact that plaintiff herself admitted that all the other workmen, except the man loosening the dirt in the pile of dirt for her, were on the other side of the track.

"You must decide whether this condition existed long enough so that the defendant, under all the circumstances, could be said to have failed to have used reasonable care in not removing the pebbles by sweeping or otherwise."

It should be noted that plaintiff, in her requests for charge, did not request the Court to instruct the jury that the defendant had a duty of antecedent inspection, but only a duty of inspection (362a-363a). The charge of the Court was thus in conformity with plaintiff's request.

Petitioner now contends, however, that the Trial Court erred in failing to charge that the defendant was under duty to make an inspection antecedent to the employees' working in the place in question, and impliedly contends that the failure to make such antecedent inspection in itself constitutes negligence, irrespective of the length of time the allegedly unsafe condition has existed and irrespective of whether the employer had actual or constructive notice of its existence. Such is not the law as set forth in the cases decided in this Court and the lower courts, and petitioner is in effect asking this Court to impose an additional burden upon the employer defendant, which burden was not contemplated by the Federal Employers' Liability Act.

The Act gives a right of action to railroad employees "for such injury resulting in whole or in part from the *negligence* of any of the officers, agents or employees of the carrier" (emphasis added). Although Congress has

eliminated certain common law defenses such as the bar of contributory negligence, assumption of risk, and the "fellow servant" doctrine, common law principles are still applicable in determining the alleged negligence of a defendant railroad employer—*i. e.*, the test is whether the employer *used reasonable care,* which question is for the jury to determine where there is probative evidence giving rise to such an issue. The Act does not prescribe the standards by which the jury shall determine what constitutes reasonable care. The cases have held that a railroad employer is not under an absolute duty to provide an absolutely safe place for its employees to work, but that *its duty is to use reasonable care to provide a reasonably safe place to work.*

In determining whether a person has used reasonable care where an unsafe or defective condition is disclosed either upon his premises or upon premises where his employees work, the authorities hold that it is necessary for the plaintiff to establish that the unsafe condition existed for a sufficient period of time prior to the injury so that the defendant may be considered to have had knowledge or notice of its existence in sufficient time to take steps to remedy the condition; the principle is and should be no different in this respect as to railroad employers and employees than it is with respect to other persons; *Kaminski* v. *Chicago River and Indiana R. Co.,* 200 F. (2d) 1 (C. A. 7, 1952); *Frizzell* v. *Wabash R. Co.,* 199 F. (2d) 153 (C. A. 8, 1952); *Wetherbee* v. *E. J. and E. Ry. Co.,* 191 F. (2d) 302 (C. A. 7, 1951); *Beattie* v. *E. J. and E. Ry. Co.,* 217 F. (2d) 863 (C. A. 7, 1954); *Finnegan* v. *Monongahela Connecting R. Co.,* 379 Pa. 63, 108 A. (2d) 321 (1954).

No case cited by Petitioner supports the proposition that there is an absolute duty of antecedent inspection imposed upon a railroad employer. The cases cited by Petitioner turn upon whether the railroad employer is deemed to have actual or constructive notice of the exist-

ence of the unsafe condition, by reason of (1) notice from the employee or others as to the condition; or (2) existence of the condition for a sufficient period of time so that it should have been discovered by the employer; or (3) an obvious extra-hazardous condition, such as a washout.

If Petitioner's position were adopted, a jury would automatically be required to find in favor of a plaintiff employee where the employee has been injured due to an unsafe condition, without considering the length of its existence, because the railroad employer would be required to have inspected its entire system, detected any unsafe condition and eliminated it prior to the arrival of the employee. Such a principle not only would impose an intolerable burden upon any railroad employer, but also it does not conform to the test established by the F. E. L. A. and the authorities.

The Court of Appeals therefore correctly affirmed the Trial Judge's charge as to the duty of inspection.

POINT III.

The Court of Appeals correctly affirmed the action of the Trial Judge in permitting the jury to consider whether plaintiff's injury was the result of an unavoidable accident.

Petitioner contends that because there was evidence in this case from which the jury might infer that plaintiff's injury was caused by defendant's negligence, the Trial Court should not have allowed the jury to consider the equally possible inference that plaintiff's injury was the result of an unavoidable accident. Such is not the law.

Not only did the pleadings (including defendant's Answer, which denied negligence) and the arguments of counsel for defendant (1b, 316a) support the possibility that plaintiff's fall was due to a pure accident, but also the testimony supported such a possible defense. Plaintiff, in giving her testimony at the hearing shortly after the accident, indicated that she did not know what caused

her to fall, and that she did not know whether she slipped or tripped, and she did not mention the possible existence of pebbles on the street (63a-71a); and she was short and stout (73a). Plaintiff's foreman testified that there were only a few scattered pebbles in the area where she fell and only 1, 2 or 3 pebbles at the point where she fell (221a-222a).

On the basis of that testimony it was quite possible (and indeed likely) that the jury would disbelieve the plaintiff's contention that she fell due to the existence of a mass of holes and pebbles on the street and would, on the other hand, find that plaintiff either slipped on a single pebble the size of a fingernail, for whose existence no one could reasonably be held liable or that she merely lost her balance or turned her ankle and fell.

The cases cited by Petitioner do not support her contention and are not applicable to the instant case, since they were cases in which no evidence was adduced at the trial which could support an inference of unavoidable accident, whereas in the instant case such evidence was present.

It is likewise submitted that the dissenting opinion of Judge Kalodner (16a) is incorrect in suggesting that the Trial Judge's instruction concerning the possibility of an unavoidable accident "inferentially ruled that there was no absolute duty on the part of the defendant to provide plaintiff with a reasonably safe place to work" and in effect removed the "safe place to work" issue from the jury's consideration. Judge Kalodner unjustifiably assumed (1) that the employer's duty to provide a reasonably safe place to work is *absolute* when in fact its duty is *to use reasonable care*, and (2) that the existence of one or two pebbles created *per se* an unsafe place to work, whereas a jury could, and should be permitted to find that the existence of those few, tiny pebbles did not create an unsafe place to work and, on the contrary, that plaintiff's injury was the result of an unavoidable accident.

POINT IV.

The Court of Appeals correctly affirmed the Trial Judge's charge as it dealt with plaintiff's burden of proving her case "by a preponderance of the evidence," even though it contained the words "convince" and "doubt."

The Court charged the jury as follows (329a):

> "The plaintiff has the burden of proving to you by the weight or the fair preponderance of the evidence that the defendant or its employees, other than the plaintiff, did not provide her with a reasonably safe place to work and that this negligence caused, in whole or in part, this injury to plaintiff. If, after considering all the evidence, the question of whether or not the defendant or its employees, other than the plaintiff, of course, were negligent in failing to use reasonable care to provide plaintiff with a safe place to work is so evenly balanced in your mind that you have no conviction, then you must find for the defendant. It is her burden to convince you that there was this negligence. Also, if the question of whether or not such negligence was a factor in causing the injury is so evenly balanced in your mind that you have no conviction, then you must find for the defendant."

And further (333a):

> "Now, this is one of the big points for you, this question of whether the plaintiff has proved to you by a preponderance of the evidence that there was a failure to use reasonable care under all these circumstances. There she was with her galoshes, her overalls, her work jacket. The evidence must do more than raise a doubt in your mind on these points, if plaintiff is to sustain the burden. If there is just a doubt in your mind, you must bring in a verdict for the defendant, and that ends your consideration of the

> case. You don't need to go any further. On the other hand, if you are convinced by the preponderance of the evidence that the defendant or its employees, other than the plaintiff, were negligent, and that this negligence was a factor in causing the injury, then you must find for the plaintiff."

Petitioner has extracted certain portions of those charges, has emphasized the words "doubt" and "conviction" and argues (p. 22) that by the use of those words the Court told the jury that the plaintiff must prove her case "beyond doubt".

Respondent submits that a fair-minded reading of the above quoted portions of the charge gives rise to no such interpretation. Nothing in the charge contained any reference to the plaintiff being obliged to prove her case "beyond doubt". The Court repeatedly used the phrase "by a preponderance of the evidence," not merely in other portions of the charge but in the specific portions in which the words "doubt" and "convince" were used.

Respondent submits that the effect of the Court's charge was to instruct the jury that there must be more than a scintilla of evidence raising a question in the juror's mind as to whether the defendant might have been negligent, before it could bring in a verdict for plaintiff upon the issue of negligence. As indicated by the Court in its Opinion and Order (395a-397a), the use of the words is consistent with the language of the United States Supreme Court in *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U. S. 104, at 112, 86 L. Ed. 89, 62 S. Ct. 156 at 161 (1941), where the Court stated:

> "Wherever the burden rests, he who undertakes to carry it must do more than create a doubt which the trier of fact is unable to resolve."

The opinion of the Court of Appeals (5a-9a) considers the use of the words "doubt" and "convince" in

considerable detail, in the light of the authorities. The cases cited in Judge Kalodner's dissenting opinion (11a-16a), and repeated in the Petition (22a-24a) were cases in which courts have held that to require a plaintiff to prove his case by "clear, convincing evidence" or "reasonable certainty" or beyond "any doubt" imposed too stringent a burden of proof upon the plaintiff. In those cases the Trial Judge failed to make clear in his charge that the jury need be only "convinced" by a preponderance of the evidence.

It is submitted that the analysis of the Court of Appeals was correct and that the charge of the Trial Court adequately explained the plaintiff's burden of proof.

POINT V.

The Court of Appeals correctly affirmed the action of the Trial Judge in charging that the jury "should no more be swayed by sympathy for the plaintiff than for the widows and orphans who may be receiving dividends or interest from the defendant company and who may need that income for themselves and for their families" and that no sympathy for either side should play a part in its decision.

At the trial plaintiff testified that she had raised two children who were not her own, and who were now grown up and living elsewhere (11a-12a). In spite of this testimony counsel for the plaintiff, in the course of his closing argument (303a-307a-8a), made an obvious attempt to appeal to the sympathy of the jury by conveying the impression that plaintiff needed, and was entitled to, a substantial sum, so that she could provide for two little children. The Court charged the jury as follows (325a):

> "If you are sympathetic or prejudiced in favor of or against either the plaintiff or the defendant, you should not allow such sympathy or prejudice to influence you at all in your verdict. You should no

more be swayed by sympathy for the plaintiff than for the widows and orphans who may be receiving dividends or interest from the defendant company and who may need that income for themselves and for their families. No sympathy of any sort for either side should play any part in your decision."

The Petitioner contends (25a) that this portion of the charge contained prejudicial error in that it brought "extraneous material" into the case. Respondent submits, however, that the charge was perfectly proper (1) in view of the conduct of plaintiff's counsel and (2) irrespective of such conduct.

As was pointed out in the opinion of the Court of Appeals (3a), a Federal Trial Judge has the right, indeed the duty, to make it clear to the jury that no sympathy of any sort for either side should play any part in their decision. The conduct of plaintiff's counsel, in injecting his improper attempt to appeal to the jury's sympathy, certainly deserved comment by the Trial Court in an effort to avoid a decision based on any such consideration. Contrary to the dissenting opinion of Judge Kalodner (11a) it is apparent that the Trial Judge was not seeking to "extinguish the flame of sympathy for foundlings ignited by plaintiff's counsel with a countering flame of sympathy for widows and orphans." A reading of the charge will indicate just the opposite; the Trial Judge was attempting, in as graphic a method as possible, to impress the jury with the need to eliminate from their consideration sympathy for either side.

Respondent further submits, however, that the thought expressed in this portion of the Trial Judge's charge would have been perfectly proper, even in the absence of the conduct of plaintiff's counsel in the instant case. Nowadays, when large verdicts in favor of individual plaintiffs against corporate defendants are often based, not on the weight of the evidence but on the jury's belief

in the defendant's supposed ability to pay (which belief creates, in effect, sympathy in favor of the plaintiff and prejudice against the defendant, irrespective of the testimony) it should be perfectly proper for a Trial Judge to do more than merely utter the sterile phrase "your verdict should not be based upon sympathy, bias or prejudice," but to go further and place the parties on equal terms in the eyes of the jury by a graphic example which, in effect, points out that while the plaintiff is an individual who may need money, a defendant corporation is actually made up of individuals who may also need money and therefore that the jury's consideration should not be based upon which party has or needs the money, but solely upon the facts relating to liability and damages.

Respondent therefore submits that the charge contained no prejudicial error in this respect.

CONCLUSION.

Contrary to the assertions of the Petition, this is not an important case, filled with significant legal principles requiring enunciation by this Court. It is purely and simply a case of a woman who fell on the street while carrying an empty shovel; who was able to have her case submitted to a jury against her railroad employer, solely by reason of her assertion (made five years after the accident and contradicted by her statement made two months after the accident and by ample testimony of other witnesses) that she fell due to the existence of a mass of pebbles where she was walking. Although almost devoid of any evidence which might impose liability upon her employer, the case was submitted to the jury upon a full, fair and complete charge, and the jury found in favor of the defendant.

Even taken out of context by Petitioner the portions of the Trial Court's charge complained of do not contain

prejudicial error; read in its entirety the charge will be seen to be fair to both parties. Neither the charge of the Trial Judge nor the Opinion of the Court of Appeals raises any new questions for this Court to consider. The cases cited by Petitioner, with which she contends the decision of the lower court is in conflict, in fact are not in conflict with it. Those cases either do not support the principles contended for by Petitioner or concern fact situations unrelated to those involved in the instant case.

If the Petition is denied, there will be no effect upon the law, either in F.E.L.A. cases or in general civil litigation, and will affect only Petitioner herself, whose right to recover has already been denied by a jury.

The Petition for a Writ of Certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1956.

No. 886.

LUCILLE H. BURCH,
Petitioner,

v.

READING COMPANY,
Respondent.

PETITIONER'S REPLY BRIEF.

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OCTOBER TERM, 1956.

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Respondent.

PETITIONER'S REPLY BRIEF.

This Brief is submitted in reply to Respondent's Brief in opposition to Petition for Writ of Certiorari.

ARGUMENT.

Introduction.

Upon examination, Respondent's argument [1] fails completely to apprise this Court of a single reason why the Writ should be denied. It claims that the decision of the Court of Appeals ". . . is not in conflict with any of the decisions cited in the Petition . . . ", and yet the Petition points squarely to genuine conflict between (1) decisions in this Court and the decision below as well as between (2) decisions in seven Courts of Appeals, State Courts of last resort and the decision below. Respondent has made utterly no effort to explain what it says is harmony in areas where in truth there is real and substantial conflict and critical disruption of settled rules

1. Respondent's Brief, p. 6.

of law. The hard truth of the matter is that Respondent never comes to grips with the cases cited in the Petition. Yet those cases are authoritative in all the areas involved here.

The Petition accurately cites and discusses fifty cases, only one of which even appears in Respondent's Brief. Surely Respondent's naked conclusion that there is no conflict should be demonstrable through some more rational and convincing method than its simply saying there is no conflict. We have advised the Court of the controlling cases. Respondent had them before it, and yet in not a single instance in its entire Brief has it gainsaid the argument we propounded from those holdings. If consonance did in fact exist as between the decision below and other controlling law Respondent had ample opportunity to demonstrate it to the Court. Respondent did not, and we are confident it could not. Its failure in this respect underscores the urgent need for the granting of the Writ. Each of the errors below and the conflicts created by them is a potential Pandora's box of additional litigation and appeals in most F. E. L. A. cases and in great areas of general civil litigation.

I.

Respondent dealt with the question of exclusion of evidence regarding the negligent direction or *permission* of petitioner to work beyond her capacity by simply refusing to acknowledge the reasons stated by the trial judge for that exclusion: the "conflicing inferences" that might be drawn therefrom (386a). The courts below at least recognized the probative significance of the evidence, but were in serious error in taking it from the jury when it could only be for the jury.[2] The point, of course, is lost completely by Respondent when it urges its spurious no-evidence theory. This is not the basis on which the evidence was excluded. Respondent thus goes much beyond

2. Lavender v. Kurn, 327 U. S. 645, 66 St. Ct. 740 (1946).

the error of the courts below in attempting to deny the significance of proof which those courts admit: that it was proof susceptible of conflicting inferences.

II.

The argument advanced at page 12 of Respondent's Brief in regard to the duty of antecedent inspection is a totally confused and inaccurate statement of the employer's duty under the F. E. L. A. Its distortion is dramatic corroboration of our position that a clear statement of the law on the point is urgently needed. It is a confusion created by mixing concepts of reasonable inspection and reasonable repair with the absolute duty on the employer to furnish a reasonably safe place to work. It falls into the embarrassing error of the courts below: of positing the carrier's failure to furnish a safe place to work and then withdrawing liability by stating that what is by definition negligence is not necessarily negligence because the employer may not have had enough time to make the inspection and correct the unsafe place *after* the employee's arrival on the scene. The reasonable inspection and the reasonable repair are the acts which must be performed by the employer in prosecution of its absolute antecedent duty to furnish a reasonably safe place to work. The negligence is the failure to furnish or to provide the employee with the safe place at the outset.[3] The law must, in logic and in fact, mean this and only this. This Court should now make that clear and resolve any further confusion on this most vital problem which is part of many if not most F. E. L. A. cases.

Note that the effect of the decision below is nothing less than a ruling by the trial court that, as a matter of law, the employer may direct his employee to suffer any kind of condition of employment, and is liable only if *thereafter* he fails to discover and correct the dangerous condition, however patent it may be. This is clearly contrary to

3. This explicitly requires reasonable inspection of the place where the employee is to work *before* he starts to work at that point.

Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413 (1949) and is a bland reliance on *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, 34 S. Ct. 635 (1914) which *Wilkerson* declared no longer to be the law. 336 U. S. 69, 69 S. Ct. 421 (1949).

Respondent's error here also infects its discussion of the third point involving the problem of unavoidable accident as is manifest in its confounding of the rationale in Judge Kalodner's dissent at Page 13 of its Brief.

III.

Respondent treats the point involving the burden of proof by, in effect, saying we did not give the charge a fair reading. In that connection we merely ask this Court to read Judge Kalodner's dissent below. It is no defense of the error below to avoid its existence by pointing only to those portions of the charge which do not contain the error. The fact is that the burden of proof appropriate in a criminal case should under no circumstances appear in an F. E. L. A. jury charge whether it be by fleeting reference (which it certainly was not here) or repeated restatement (which it certainly was here).

IV.

Respondent's treatment of the final point involving the unnamed, unproven widowed and orphaned stockholders is a brazen affront to the spirit and letter of the F. E. L. A. It says that trial courts should:

> ". . . place the parties on equal terms in the eyes of the jury by a graphic example which, in effect, points out that while the plaintiff is an individual who may need money, a defendant corporation is actually made up of individuals who may also need money and therefore that the jury's consideration should not be based upon which party has or needs the money, but solely upon the facts relating to liability and damages."[4]

4. Respondent's Brief, p. 18.

The rampant mischief of this view and the error below is patent: (1) this material is *de hors* the record; (2) it is irrelevant; (3) even if *pro arguendo* "neutralizing" were a valid concept, this is not neutralizing. The whole system of public utility economics with its concept of a fair return through rate-making relief available to carriers belies the notion that the needy railroad investor stands in the same status as the injured railroad employee, and that the plight of the investor "neutralizes" the plight of the injured employee. The injured railroad employee has been given a remedy for his physical and economic condition by a solemn act of Congress: the F. E. L. A. The railroad investor, if injured economically, has his remedy completely distinct from the F. E. L. A. There is no justifiable reason, and none was advanced either by the courts below or Respondent, as to why those remedies should be confounded as the trial judge did in his jury charge. We can only wonder what the reaction in the courts below would have been in a turnabout which is conceptually as valid as the "neutralization" attempted here: if in a rate-making litigation an adjudicating body had "neutralized" the appeal of proven widowed and orphaned railroad investors by injecting into its consideration the pressing needs of unnamed, unproven injured carrier employees.

CONCLUSION.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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